Ontario

REPORT OF THE ONTARIO COURTS INQUIRY

THE HONOURABLE T.G. ZUBER

1987

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Court Reform in Ancient Times

On the morrow Moses sat to judge the people, and the people stood about Moses from morning till evening. When Moses' father-in-law saw all that he was doing for the people, he said, "What is this that you are doing for the people? Why do you sit alone, and all the people stand about you from morning till evening?" And Moses said to his father-in-law, "Because the people come to me to inquire of God; when they have a dispute, they come to me and I decide between a man and his neighbours, and I make them know the statutes of God and his decisions." Moses' father-in-law said to him, "What you are doing is not good. You and the people with you will wear yourselves out, for the thing is too heavy for you; you are not able to perform it alone. Listen now to my voice; I will give you counsel, and God be with you! You shall represent the people before God, and bring their cases to God; and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do.

Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. And let them judge the people at all times; every great matter they shall bring to you but any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you. If you do this, and God so commands you, then you will be able to endure, and all this people also will go to their place in peace."

So Moses gave heed to the voice of his father-in-law and did all that he had said. Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, of hundreds, of fifties, and of tens. And they judged the people at all times; hard cases they brought to Moses, but any small matter they decided themselves. Then Moses let his father-in-law depart, and he went his way to his own country.

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Glossary of Terms

application: a summary type of court case which is resolved on the basis of written evidence only and which usually involves a dispute on a point of law only.

assessment of costs: see Appendix 2.

assize and nisi prius: historically judges travelling on circuit to the various county towns could only hear cases if they were authorized by the government to do so. Therefore, commissions were granted by the government to judges on circuit. A commission of assize and nisi prius allowed judges to sit with a jury drawn from the county.

civil law: the body of law governing rights and obligations between individuals.

common law: a system of law, originating in England, based on ancient customs which have been affirmed by court decisions. This body of law is contrasted with statute law, which is passed by Parliament or the Legislature.

costs: see Appendix 2.

court of first instance: a court which hears a matter for the first time, in contrast to an appeal court.

criminal law: the body of law which governs the relationship of the individual to the state and which creates offences punishable by fine or imprisonment in order to protect society as a whole.

discovery: in civil law, a pre-trial procedure that is used by one party to obtain facts and information about the case from another party to be used in the preparation for trial.

election: in criminal law, the right of the accused or the Crown to choose the type of trial or the mode of procedure.

equity, equitable: a body of law which was developed by judges parallel to, and independent of, the common law. Equity provided an alternative to the sometimes harsh rules of the common law, since it determined what was fair in a given situation. Equity was administered in a separate court in Ontario until 1881.

felony: a term applied to the more serious criminal offences which carried the most serious penalties, including death. This term disappeared in Canada with the introduction of the Criminal Code in 1892.

French civil law: a system of law governing rights and obligations between individuals, the origins of which can be traced back to Roman times and which came to Québec from France in the 17th century in the form of textbooks and commentaries that were adhered to in decisions by the courts. The principles of law in the French system were somewhat different from those in the English common law. The principles of French civil law were recorded in a comprehensive Civil Code in Québec in 1865.

habeas corpus: a prerogative writ which is used to release a person from custody if they have been unlawfully detained.

interlocutory: a type of procedure or decision made before or after the final disposition of the case and which decides some issue in the case, but does not dispose of the whole case. Examples are questions about how the matter will proceed to trial or how the court's judgment may be enforced.

judicial review: a procedure for review by a superior court of the decision of an administrative tribunal or a lower court and reversal of the decision if there has been an error of law or if the tribunal or court went outside its jurisdiction.

misdemeanor: a term applied to less serious criminal offences which usually carried a penalty of a fine or a short jail term. This term disappeared in Canada with the introduction of the Criminal Code in 1892.

motion: a request to the court for a decision on an issue or procedural point which occurs as part of a case. See interlocutory.

oyer and terminer and general gaol delivery: commissions given to circuit judges, generally combined with a commission of assize and nisi prius, and authorizing the judges to hear any criminal matter which had arisen since the previous assizes, and to deal with any prisoners who were in the county jails.

parens patriae jurisdiction: literally "parent of the country". Jurisdiction held by the High Court of Justice to protect the rights of children and the mentally disabled.

pleadings: formal documents filed in a civil court case in which each side sets out the factual grounds for a claim or a defence to the other side's claim.

prerogative writs: special remedies available on a judicial review application (see above). They include setting a decision aside (formerly called certiorari), prohibiting an authority or lower court from proceeding, ordering an authority or court to carry out its duties (formerly called mandamus) and habeas corpus (see above).

probate: a term originally used only to refer to the procedure whereby a will was proved to be valid or invalid. Now the term also is used popularly to include all matters pertaining to the administration of wills and estates.

superior court: see section 2.6

CHAPTER 1

Introduction and Acknowledgements

This Inquiry was authorized by order in council as follows:

> **WHEREAS** the Ministry of the Attorney General has received in the past several years numerous submissions from judges, lawyers and the public proposing changes in the courts of Ontario;
>
> **AND WHEREAS** the Ontario Law Reform Commission produced a report on the administration of the courts of Ontario in 1973, making certain recommendations for changes;
>
> **AND WHEREAS** the Unified Family Court was established as a demonstration project in 1977 in Hamilton and made permanent in 1982, there is general acceptance of the principle that there should be one court with general jurisdiction in all family law matters, the government is interested in expansion of the court over a wider area in the near future, and concerns have been expressed that the court is not integrated into the system of courts having jurisdiction in family law;
>
> **AND WHEREAS** the Provincial Court (Civil Division) was established as a demonstration project in 1980 in Metropolitan Toronto and made permanent in 1985, there is general acceptance of the concept of a small claims court with increased jurisdiction, the government is interested in the expansion of the court over a wider area in the near future, and concerns have been expressed that the court is not integrated into the system of courts of civil jurisdiction;
>
> **AND WHEREAS** there is an apparent lack of rationalization of the jurisdiction of the courts of Ontario and there appear to be unnecessary areas of overlapping functions;
>
> **AND WHEREAS** the jurisdictional changes brought about by the Courts of Justice Act, 1984 are having an impact on the courts and it would be desirable to review that impact;
>
> **AND WHEREAS** it has become apparent that

increasing demands are being placed on the courts of Ontario as a result of constitutional and legislative changes and changes in society;

AND WHEREAS measures must be taken to deal with the increased demands on the judiciary, administrative personnel and courtroom space;

AND WHEREAS increasing caseloads have placed pressure on the courts to assign duties with respect to important issues and contested cases to persons who are not members of the judiciary and who then report to the judiciary for confirmation;

AND WHEREAS major changes have taken place in recent years in the courts of other provinces of Canada and other jurisdictions;

AND WHEREAS it now appears desirable to have a thorough evaluation of the jurisdiction, structure and organization of the courts of Ontario and other matters relating to the service provided to the people of Ontario by the courts of the province;

NOW THEREFORE on the recommendation of the Attorney General, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that the Honourable Thomas George Zuber, a judge of the Supreme Court of Ontario, member of the Court of Appeal and ex officio member of the High Court of Justice, be authorized to inquire into and requested to report by April 1, 1987 on the jurisdiction, structure, organization, sittings, case scheduling and workload of all of the courts of Ontario, and any other matter affecting the accessibility of and the service to the public provided by the courts of Ontario, and to make recommendations to the Attorney General concerning the provision of a simpler, more convenient, more expeditious and less costly system of courts for the benefit of the people of Ontario.

Recommended "Ian Scott" Attorney General
Concurred "Elinor Caplan" Chairman

Approved and Ordered "May 22, 1986" Date
"Lincoln M. Alexander" Lieutenant Governor

O.C. 1438/86

Although the order in council was passed on May 22nd, 1986, I was unable to begin the Inquiry until I had completed my assigned sittings with the Court of Appeal. As a result, the Inquiry began in July of 1986.

While public hearings were not conducted, other procedures were used to seek the widest possible participation in the work of this Inquiry. Advertisements were placed in newspapers throughout Ontario soliciting the views in writing of anyone interested in the administration of justice in this province. In addition, letters soliciting opinions were sent to a very large number of organizations, including county law associations, professional organizations, trade unions and police forces.

In response to these general and specific invitations, a great many helpful letters and briefs were received. A list of those making representations by letter or by more formal briefs is contained at the end of the report. Some of those filing briefs asked that they might also meet with me and discuss their representations and, in most cases, those requests were met.

I have travelled widely throughout the province from Thunder Bay in the west to Ottawa in the east, and from Windsor in the south to Sudbury in the north. I have looked at the very largest court operations in Metro Toronto, one of the very smallest in Bruce Mines and a great many in between (see Appendix 1). The purpose of this travel was to see the justice system, its facilities and operations firsthand, and to talk to all of the people involved.

Very little travel was done outside of Ontario. Together with Mr. Perkins, counsel to this Inquiry, I spent five days in Montreal speaking to judges and administrators respecting the organization and management of the court system in Quebec. Mr. Perkins visited judges and officials in British Columbia and Alberta. I also visited the courts in Michigan to learn what I could from that system. All of these visits and observations were helpful, but led to the view that any further travel was not necessary. In the end result, our problems are our own and must be solved by solutions tailored to the needs of this province.

Court reform is not new and has been undertaken in a number of jurisdictions. A great deal of literature on the subject has been produced. This Inquiry has collected literature from every province, from many of the American states and from the United Kingdom. We have reviewed all of this literature. In Ontario itself, there have been substantial studies of the justice system and we have carefully reviewed the McRuer Report, 1968; the Ontario Law Reform Commission Report on the Administration of Ontario Courts, 1973; the Kelly Report, 1977; and the Mewett Report, 1981.

In all of this material, we found that the problems were largely the same in all jurisdictions: costs, delay and inefficiency. In Ontario, many of our problems have existed for a very long time.

In the review of all of the letters and briefs filed with this Inquiry and the literature from other jurisdictions, and from our own investigation and observations, it became clear that the problems with the justice system are enormously complex and that there is no quick fix or magic solution. It became apparent that what was needed was a detailed and major overhaul of an extremely complex mechanism. In seeking solutions, however, it was also apparent that the perfect solution was frequently an illusion. However, the fact that perfection is not attainable has not deterred this Inquiry from seeking solutions, imperfect as they may be, which will improve the administration of justice in this province.

I should add, as well, that it would be overstating the case to suggest that the justice system in this province is in a state of collapse; it is not. The system continues to function but not nearly as well as it should and it requires substantial change.

What follows in these pages is not intended to be a doctoral dissertation. It is an attempt to produce workable solutions to a wide range of structural, management and operational problems. I have not been overly concerned by an occasional doctrinal inconsistency. My approach has been essentially pragmatic and designed to produce solutions that are attainable and workable.

Through the briefs filed, and as a result of my conversations with lawyers, judges and court officials throughout this province, I have found a high degree of readiness and enthusiasm for reform. Many of those working in the justice system are anxious to get on with the task of improvement.

This attitude towards reform exists not only in this jurisdiction but in many other jurisdictions as well. When the work of this Inquiry was well under way and recommendations were in draft form, we were comforted to learn that many of the conclusions that we had reached were similar to those contained in the Civil Justice Review, Consultation Paper #6, published in England by the Lord Chancellor's department.

However, it would not be accurate to say that everyone concerned with the justice system is enthusiastic about change. There are some who are quite satisfied with things as they are. I take it to be obvious that if this report finds favour with the government of Ontario, and it is intended to implement all or part of this report, then particular care must be used in selecting the people who will control the new system, judges and administrators alike. Such people should be distinguished by their ability and their commitment to reform.

I wish to acknowledge and express my thanks for the help given this Inquiry by the judges, lawyers and court officials of Ontario. Any attempt to list them would produce a list of almost impossible length.

There are a number of people from outside this province who gave generously of their time and advice. They are: The Hon. Marcel Crête, Chief Justice of Quebec; The Hon. Alan B. Gold, Chief Justice of the Superior Court of Quebec; The Hon. Lawrence Poitras, Associate Chief Justice of the Superior Court of Quebec; The Hon. Gaston Rondeau, Chief Judge of the Provincial Court of Quebec; The Hon. Guy Guérin, Chief Judge of the Court of Sessions of the Peace, Quebec; The Hon. Albert Gobeil, Chief Judge of the Youth Court, Quebec; Robert J. Colombo, Jr., Judge of the Circuit Court, Detroit, Michigan; Lorraine Laporte Landry, Director of Judicial Services, Montreal; The Hon. Allan McEachern, Chief Justice of the Supreme Court of British Columbia; David Duncan, Manager, Court Services, The Law Courts, Vancouver, British Colombia; Fred Messenger, Director of Judicial Administration, Supreme Court of British Columbia; Ben Holland, Manager, Courts Services, Provincial Court, Vancouver, British Colombia; and Paul Zyla, Regional Director (North), Court Services, St. Albert, Alberta.

I am particularly indebted to Professor Ed Ratushny of the University of Ottawa Law School, Professor Peter Russell of the University of Toronto and Professor Carl Baar of Brock University for their time and helpful advice.

Diana Schwartz ran the office of this Inquiry with grace and efficiency and, together with Madeline Ross, produced endless memos and drafts and finally this report itself. Claude Gillard swiftly and competently translated the report into French.

I wish to extend my special thanks and appreciation to Julianne Parfett, the solicitor to this Inquiry, and to Craig Perkins of the Attorney General's department, Counsel to this Inquiry. Together, they made me the fortunate beneficiary of their knowledge, advice, industry and good cheer.

While my burden has been lightened to a great degree by the help I have received, there is one aspect of this enterprise that cannot be shared. The responsibility for what follows is mine alone.

Thomas G. Zuber
Osgoode Hall
Toronto.

CHAPTER 2

The History of the Courts in Ontario

2.1 INTRODUCTION

The date most commonly used when embarking on a history of the courts in Ontario is 1763, the date when New France became British North America. The choice of this date assumes that there were colonists in the area now known as Ontario for whom courts were to be organized. In fact, the new British colony of Quebec, which extended from the Gaspé Peninsula through to northern Michigan, Ohio and Illinois, was very sparsely populated. The vast majority of colonists lived along the St. Lawrence River valley, and most of the territory which now constitutes Ontario was closed to colonists and reserved for the fur trade. The organization of the courts during the early history of the new colony reflected this situation.

2.2 GENERAL - 1763-1792

The proclamations concerning the administration of justice in the colony of Quebec in this period were influenced by the political situation in the American colonies. The European population of Quebec was francophone and Catholic and antipathetic to the English Protestants. The colonists to the south were becoming increasingly rebellious and the British government was anxious to conciliate the Quebecois and to avoid trouble on a second front.

The Royal Proclamation of October 7, 1763 established civil government in the colony of Quebec. The aim of this proclamation was to provide for the implementation of British law and constitutional practices in the new colony. These constitutional practices were to include a legislative assembly, but successive governors did not consider the colony to be ready for "responsible" government. It was also decided to limit the application of British law to the criminal field.

In 1764, the Governor in Council provided for three courts: a superior court of criminal jurisdiction called the Court of King's Bench, a civil court called the Court of Common Pleas and a local criminal court called the Court of Quarter Sessions. The civil law applied by the Court of Common Pleas was the French civil law. This situation was intended to be temporary but the intervention of the American Revolution delayed transition to the common law.

The American Revolution had a profound effect on the government of the colony of Quebec. Fearful of the loss of its entire North American colony, the British made several important decisions. They continued to apply French civil law to matters involving property and civil rights, they permitted Roman Catholics to participate in government and there was full religious freedom. The latter two freedoms were something the British themselves did not possess.

2.3 THE JUSTICE OF THE PEACE 1763-1792

The application of British criminal law to the new colony in 1763 brought with it other trappings of British justice, including the office of the justice of the peace.

When the justice of the peace system was imported directly into Ontario, the powers of a justice of the peace were very broad. Justices of the peace tried a large number of offences, including some felonies. A property holding requirement of $300 was also established, although this could be waived.

2.4 THE QUEBEC ACT - 1774-1776

The Quebec Act of 1774 formalized the practical division of the law between British criminal law and French civil law.

By the end of the American Revolution, the boundaries of the colony of Quebec had shrunk. The territories of Ohio and Illinois were lost, so that Quebec now comprised all territories north of the Great Lakes. However, the population was increased by a flood of United Empire Loyalists who settled in the western portion of Quebec, south of the Ottawa River. This area later became Upper Canada. They brought with them strong ties of loyalty to the British, ties made even stronger by the effect of the American Revolution.

In 1777, Canada (as the colony was now called) was divided into two judicial districts - Quebec and Montreal - with the territories of Upper Canada falling within the district of Montreal. Four different types of courts were set up: a Court of Common Pleas with civil jurisdiction, a Court of King's Bench with full criminal jurisdiction and a Court of General Sessions of the Peace which dealt with minor criminal matters and was presided over by justices of the peace living in the outlying settlements. There was no court of appeal. However, the Governor in Council would hear appeals on matters up to five hundred pounds. Anything over that amount had to be appealed directly to the King in Council in London, England. In practice, there were very few appeals.

This structure did not last long because of the difficulties faced by the Loyalist settlers with the lack of easy access to the civil courts. The nearest court was in Montreal. By letters patent of 1788, five new districts were created, four of which were later separated to become the province of Upper Canada. In honour of the Hanoverian kings, who now sat on the throne in England, the four new districts were called - from east to west - Lunenburg, Mecklenburg, Nassau and Hesse. The 1788 proclamation established a Court of Common Pleas in each district. This court had unlimited civil jurisdiction and was presided over by lay judges. The only exception to the use of lay judges occurred in Detroit, the capital of the district of Hesse. The city of Detroit was a centre of business activity and the merchants wanted a legally trained judge to handle commercial cases. The only barrister in Upper Canada at that time was William Powell and he became the Common Pleas judge in Detroit. The Jay Treaty of 1794 confirmed the boundary between Canada and the United States established by the Treaty of Paris in 1783. As a result of this treaty, Detroit became part of the United States.

The lay judges of the Court of Common Pleas were not appointed surrogates to the governor and, as a result, they could not grant letters of probate or administration or deal with guardianship and family matters. Instead, in keeping with the French tradition, they presided over Prerogative Courts which had jurisdiction to appoint guardians for minor children.

2.5 THE UNITED EMPIRE LOYALISTS 1776-1792

The United Empire Loyalists were unhappy with the application of French civil law to all civil matters in the colony because it was a legal system with which they were unfamiliar. In 1789, the judges of the Mecklenburg district sent a memorial to the Council at Quebec asking whether it was just that French law should apply in an area entirely inhabited by the English. The judges received no response to this letter but the pressure on the Council to change the civil law must have been mounting because in 1791, the colony was divided into two provinces: Upper and Lower Canada. The first act of the new government of Upper Canada, on October 15, 1792, was to make English common law applicable to both the civil and criminal law of the province.

There were three separate courts charged with the administration of criminal law at this time. The Court of King's Bench held two sessions in Montreal each year. This court had general jurisdiction over all criminal matters. Justices of the peace, presiding over the local Courts of General Sessions of the Peace, dealt with most crimes except capital felonies. In order to reduce the amount of travelling and the delay involved in waiting to try capital felonies in Montreal, the Governor could also issue commissions to King's Bench judges who would then travel out to the districts to try capital felonies at courts of oyer and terminer and general gaol delivery.

2.6 REORGANIZATION OF THE SUPERIOR COURTS - 1792

The first Lieutenant Governor of Upper Canada was John Graves Simcoe. He was determined to remodel the court system and to copy the court system which then existed in England. This decision to follow the English model was a pivotal one for Ontario. Lieutenant Governor Simcoe determined the character of the courts which persists to the present day. The English system involved three levels of courts. There was a local criminal court, presided over by justices of the peace, which had limited criminal jurisdiction and which could try misdemeanors. The county court had limited civil jurisdiction, while the superior court was a centralized, itinerant court with inherent, unlimited, civil and criminal jurisdiction. However, the needs of a sparsely populated, large teritory meant that, right from the beginning, the English model had to be adapted to Upper Canada's specific circumstances.

Under the English system, the jurisdiction of the superior courts originated in the Crown. The judges of the superior courts gave decisions in the king's name. They were delegated the king's inherent authority to administer the laws of the country. The king retained a residual authority to intervene in extraordinary cases where justice could not be done merely by administering the law. This was the origin of the law of equity which was delegated to the Chancellor and later to the Court of Chancery. All other courts in England were courts of limited jurisdiction whose authority was determined by statute.

Governor Simcoe established the Court of King's Bench as a superior court with inherent jurisdiction in both civil and criminal matters. This court was resident only in the capital of the province and commissions of assize and nisi prius and commissions of oyer and terminer and general gaol delivery were regularly issued by the Lieutenant Governor to allow the judges of this court to try civil and criminal cases in the districts. The districts were renamed at this time. From east to west they became the Eastern, Midland, Home and Western districts. The Court of King's Bench was a court of common law only and did not possess any of the equitable jurisdiction of the English Court of Chancery. The Court of Common Pleas was abolished and its jurisdiction absorbed into the Court of King's Bench. Despite the fact that this meant that all but minor civil matters had to be taken to the more expensive and less accessible Court of King's Bench, the general public applauded the move because they were unhappy with the decisions rendered by the lay judges of the Court of Common Pleas.

A local civil court was established called the District Court. The District Court, like the Court of Common Pleas, was staffed by lay judges, but it only had jurisdiction over matters between 40 shillings and 15 pounds. There was also a local criminal court, the Court of Quarter Sessions of the Peace, presided over by justices of the peace, who could try all misdemeanors. The justices of the peace sat either singly or in twos, and were drawn from the propertied men of each district. By 1794, Ontario already had the three tier court structure which continues to this day.

2.7 THE LOWER CIVIL COURTS - 1792-1867

As part of the reorganization of 1792, a local civil court, called the Court of Requests, was established to try civil matters up to 40 shillings. This court was presided over by justices of the peace. In 1833, the Courts of Requests were reorganized. Instead of justices of the peace, these courts were presided over by laymen who held commissions from the Lieutenant Governor. This system proved unsatisfactory and in 1841, the Courts of Requests were renamed Division Courts and were presided over by District Court judges.

2.8 RECEPTION OF THE COMMON LAW - 1792

The reception of common law into Upper Canada in 1792 created two gaps in the legal system. The Prerogative Courts, whose jurisdiction had been based on French civil law, had to be abolished. This left the province without any method of appointing guardians, probating wills, or appointing administrators of estates where the deceased left no will or failed to appoint an executor. In 1793, the Court of Probate and the Surrogate Court were established in each district. A member of the local government was designated as a judge of these courts.

The second gap concerned the law of equity, which, curiously enough, Governor Simcoe made no effort to fill. The reason may have been that Governor Simcoe and Chief Justice William Osgoode felt that the province of Upper Canada already had a court of equity in the form of the Lieutenant Governor in Council. According to English tradition, jurisdiction in equity rested with the Chancellor, who was keeper of the Great Seal. The colonial counterpart of the Chancellor was the Lieutenant Governor. Whatever the reason, it was not long before an attempt was made to create a court of equity. Lieutenant Governor Peter Hunter asked Henry Allcock, a justice of the Court of King's Bench, to draft a bill establishing a court of equity. It was never adopted. The bill was sent to Britain for an opinion and the British government declared that a court of equity was unnecessary in Upper Canada. Since the British government paid the salaries of the colonial judges, it may have been that the government did not particularly want to be put to any additional expense. In any event, the matter was not pursued because there was no consensus in the province about the need for a court of equity. This was the period about which Charles Dickens' Bleak House was written; the Court of Chancery in England was a byword for excessive expense and delay.

2.9 COURT OF CHANCERY - 1837

It was not until 1837 that the Province of Upper Canada acquired a court of equity. By that time, Upper Canada was a prosperous commercial province and the lack of any legal system relating to mortgages, trusts and specific performance of contracts was a major problem.

The first proposal by the legislature for a court of equity, in 1828, recommended simply that the judges of the Court of King's Bench be given equitable jurisdiction as well. This proposal met with serious opposition on the grounds that equity could never be administered by a court of common law. Finally, in 1837, the Court of Chancery was created and Robert Sympson Jamieson was appointed as its first judge. He was given the title of Vice-Chancellor. The creation of the Court of Chancery brought with it one unusual problem. In England, the only lawyers entitled to practise the law of equity were solicitors. However, there were no solicitors per se in Upper Canada. There were barristers who appeared before the courts, and attorneys, who practised common law. In response to this problem, all the lawyers in the province were appointed as both barristers and solicitors, and they practised both equity and common law. As a result Ontario never developed the strict division between barristers and solicitors which characterizes lawyers in the United Kingdom.

No sooner was the Court of Chancery created than a rivalry sprang up between it and the Court of Queen's Bench. Various proposals were made to unify the two courts but such a radical departure from tradition created much opposition. The first 12 years of the Court of Chancery's existence were difficult. The backlog of cases was enormous and the Vice-Chancellor was a slow and cautious judge. He chose his aides from England and his decisions often failed to reflect the local situation. He therefore did not endear himself to the people of Upper Canada.

2.10 REORGANIZATION OF THE SUPERIOR COURTS - 1849

The year 1849 saw a number of reorganizational moves, in both the District Courts and the superior court system. In 1847, the moderate reformers, led by Robert Baldwin, came to power in Upper Canada. This election paved the way for the reforms which followed. The Court of Queen's Bench was given a fourth judge. Three judges did trial work and one judge was always available to deal with motions, bail applications and other procedural matters. This system was the origin of the present Weekly Court. The Court of Chancery acquired two more judges. Its procedure was simplified and its jurisdiction was expanded to include the interpretation of wills. A new civil court was created, the Court of Common Pleas, whose jurisdiction was concurrent with that of the Court of Queen's Bench. This move was designed to relieve the heavy caseload of the Queen's Bench. In fact, the lawyers preferred the judges of the Court of Queen's Bench and few cases were taken to the Court of Common Pleas. To rectify this situation, the legislature passed a bill in 1853 requiring that writs issued within the jurisdiction of these two courts be issued in alternate batches of 12, 12 writs for the Court of Queen's Bench, followed by 12 writs for the Court of Common Pleas.

A court of appeal was also established. Up until this time, the Lieutenant Governor in Council was the nominal court of appeal. However, in practice, the Lieutenant Governor only heard appeals from the Court of Chancery. When the Court of Error and Appeal was established in 1849, the executive branch of government in Upper Canada ceased to have any judicial functions. The nine judges of the three superior courts were all appointed as ex officio judges of the Court of Error and Appeal and, at any time, three judges from these courts would sit on appeals. It is interesting to note that there was no prohibition at this time against a judge sitting on an appeal from his own judgment.

2.11 COUNTY AND DISTRICT COURTS - 1841-1867

The period from 1841 to 1867 was marked by a substantial increase in the jurisdiction of the District Courts. In 1841, all District Court judges were required to be lawyers. The District Court judges acquired some criminal jurisdiction when they became the chairmen of the General Sessions of the Peace.

The Courts of General Sessions of the Peace had been presided over by justices of the peace. When County and District Court judges became the chairmen of this court, the court sat in panels of three; one County or District Court judge and two justices of the peace. This court now heard all criminal matters except those reserved to the Court of King's Bench. This change in the jurisdiction of the justices of the peace was the start of a gradual diminution in the powers of the justice of the peace.

In 1845, the jurisdiction of the District Court was consolidated and clarified by legislation and it was determined that every district was to have a court of record with at least one judge who was to be a lawyer. This judge had to be resident in the district, and his decisions were appealable on points of law to the Court of Queen's Bench.

2.12 GENERAL - 1867-1967

In this period, there were two major events which affected the court system. These events were the passage of the British North America Act (now the Constitution Act, 1867), which established the federal system of government, and the passage of the Ontario Judicature Act of 1881, which merged law and equity.

Sections 96 to 101 of the Constitution Act, 1867 are the sections which determine the division of responsibility for the courts between the federal and provincial governments. For our purposes, only s. 96 is of any importance. This section states that the federal government is responsible for appointing the judges of the superior, district and county courts of each province. On the face of it, the section is simple and straightforward, but it has been interpreted so as to limit the jurisdiction which can be assigned to courts other than the superior or county courts. It has also been interpreted to limit the jurisdiction of provincial administrative tribunals. Stated very simply, any matter which was within the jurisdiction of a superior or county court (also called s. 96 courts) at the time of Confederation must continue to be dealt with by s. 96 courts. These matters cannot be assigned by either the provincial legislature or Parliament to a non-s. 96 court or to an administrative tribunal. As we will see later in this report, the interpretation of s. 96 has profound implications for any restructuring of the provincial court system.

2.13 SUPERIOR COURTS - 1867-1913

Prior to 1881, most of the court reforms centred on procedure. In 1868, there was a reversal of the previous practice of trying all civil matters with a judge and jury unless the parties requested otherwise. After that date, all civil matters were tried by judge alone unless a jury trial was requested. In 1869, a judge sitting as a judge of assize and nisi prius, in one of the county towns, was given the same powers in chambers as if he were sitting as a judge of the Court of Queen's Bench in Toronto. Judges were also authorized to make rules enabling the Clerk of the Crown and Pleas of the Court of Queen's Bench to exercise the jurisdiction of a judge in chambers. This was the origin in Canada of the system of masters of the Supreme Court.

In 1873, the Administration of Justice Act was passed. Its most important provision was the right given to any party to an action to examine the opposing parties or any party adverse in interest on issues in question in the action. This new procedure eventually led to the current system of discovery. This same Act also eased the rules with respect to decisions in law and equity by allowing the common law courts to pronounce such judgment as the equitable rights of the parties required.

In 1881, the Ontario Judicature Act consolidated the practice of law and equity in the courts of Ontario. In response to the Act, the Courts of Queen's Bench, Common Pleas and Chancery were united to form the Supreme Court of Ontario. This new court contained two branches: the High Court of Justice and the Court of Appeal. The High Court of Justice was further subdivided into three divisions which were made up of the three former courts in each of which both equitable and common law rules were to be applied. To further confuse the structure of the Supreme Court, the Ontario Judicature Act created three Divisional Courts of the High Court. Like the current Divisional Court, these courts were made up of panels of three judges drawn from their respective divisions. They heard appeals from the orders of a judge in chambers, proceedings directed to them by statute, cases of habeas corpus, applications for a new trial if the trial had been before a jury and any case which both parties agreed should be heard by the Divisional Courts.

In 1903, a fourth division, the Exchequer Division, was added to the High Court.

Given the fact that the Ontario Judicature Act unified the practice of common law and equity, it was not surprising that the need to maintain three and, later, four divisions of the High Court was questioned. However, it was not until 1909, following a change in government, that legislation abolishing the divisions of the High Court was passed. The same legislation abolished all the Divisional Courts and transferred their jurisdiction to the Court of Appeal. These changes were not implemented until 1913.

2.14 THE OFFICE OF THE MASTER

The Court of Chancery, when it was first established, had a Master in Ordinary and a Referee in Chambers. The office of master has a long history, although its function has changed substantially over time. Masters first appeared in England in the 1850's and their duties were consolidated by legislation in the late 1860's. Most of the duties of the masters were clerical, but they could also hear references from a judge on matters such as fixing the amount of a judgment where there had been a default. They could assess bills of costs and make decisions on certain procedural questions. However, these procedural rulings were strictly routine and involved no exercise of discretion.

In Ontario, the master could hear matters on a reference and he had considerable discretion as to how the reference would be heard. The master could only hear matters referred to him by a judge with the exception of an application to appoint an interim receiver, which could go directly to the master. The master could also make rulings on a number of procedural issues. In 1871, the legislature created a new office, the Referee in Chambers, who could hear motions which could be heard by a judge in chambers, with certain exceptions.

In the common law courts of Ontario, the Clerk of the Crown and Pleas performed functions analogous to the master in England. Again most of the duties of the clerk were clerical, but he could make rulings on routine procedural matters. In 1869, the clerk's powers were expanded. Under s. 5 of An Act respecting proceedings in Judges' Chambers at Common Law, the judges of the King's Bench were given the power to make general rules empowering the clerk to hear matters which could be heard by a judge in chambers with the exception of matters pertaining to the "liberty of the subject".

The office of the Clerk of Crown and Pleas was amalgamated with the office of Master in Ordinary and Referee in Chambers, by the Ontario Judicature Act of 1881. The office became that of the master, and the master's duties were further expanded, so that he could hear nearly all civil matters heard by a judge in chambers.

2.15 COUNTY COURTS - 1858-1909

The jurisdiction of the County Courts had expanded steadily, until at the time of Confederation, these courts had jurisdiction in tort actions up to $200, and jurisdiction in debt and contract actions up to $400. There were few other limitations on their jurisdiction. In 1858, County Court judges were appointed as ex officio Surrogate Court judges. The Probate Court was abolished.

Following Confederation, the appointment of County Court judges became the responsibility of the federal government. The Surrogate Courts, however, were left an orphan by the Constitution Act, 1867. Section 96 states that the Probate Court judges of Nova Scotia and New Brunswick are not appointed by the federal government. It says nothing about the Surrogate Courts of Ontario. Ontario has continued to appoint the Surrogate Court judges, and appoints only District Court judges as Surrogate Court judges.

The Ontario Judicature Act of 1881 enlarged the jurisdiction of the County Court and allowed County Court judges to hear motions in High Court matters by making them local judges of the High Court. This innovation prevented litigants from having to travel to Toronto, or having to wait until the next sitting of the High Court to have procedural matters heard. In 1909, the Law Reform Act provided that the County Courts had jurisdiction over all matters, unless jurisdiction was transferred to the High Court by one of the parties.

2.16 THE LOWER CRIMINAL COURTS - 1867-1967

The lower criminal courts in Ontario were presided over by a magistrate or by a justice of the peace. In 1867, it was established that justices of the peace were a provincial responsibility. In Ontario, a uniform fee schedule was created and in 1868 the Lieutenant Governor took over responsibility for appointing justices of the peace.

During the period between 1868 and 1944, there was a gradual restriction of the powers of a justice of the peace. This was due mainly to the appearance of police magistrates, who took over the functions of a justice of the peace. A police magistrate was a police officer who heard minor criminal cases. In 1873, justices of the peace were no longer required to sit with the County Court judge in order to constitute the General Quarter Sessions of the Peace. The County Court judge was authorized to sit alone in this court.

The property holding requirements for a justice of the peace were steadily reduced until they were abolished in 1935.

By 1936, justices of the peace were stripped of their trial functions, except when acting under the authority of a magistrate. The current functions and duties of a justice of the peace were established by the 1952 Justices of the Peace Act.

The Magistrates Court was not so called until 1934, but it had existed in one form or another since the province was first colonized. In 1849, this court was called the Police Magistrates Court because a senior police officer presided over the local petty offences court. A magistrate was always a justice of the peace but he had the power to do alone what two justices of the peace sitting together could do.

2.17 THE LOWER CIVIL COURTS - 1867-1967

The monetary jurisdiction of the Division Courts was raised gradually until by 1967, it was $400 in the counties and $800 in the districts. The rules of the Division Court provided that a defendant could only be sued in the area where he resided. This rule was made to ensure that the defendant would receive notice of a suit against him. The jurisdiction of the Division Courts was expanded until in 1965 they could try all civil matters within their monetary jurisdiction except those involving title to land, estates, libel and slander, suits against a justice of the peace, and requests for prerogative remedies.

2.18 THE FAMILY AND JUVENILE COURTS 1867-1967

Although there was legislation to deal with family issues, such as deserted wives and children, there were no special courts to handle these matters. Until 1893, there was no provision in Ontario for the special treatment of children who had broken the law. The Children's Protection Act of 1893 only dealt with children who committed offences under provincial statutes.

By the turn of the century, it was clear that the goverment had to become involved in family matters. The processes of industrialization and urbanization had broken down the extended family and community methods of dealing with juvenile crime and other family problems. Divorce, property division, and custody were traditionally dealt with in the Court of King's Bench.

In 1908, the federal government passed the Juvenile Delinquents Act. This Act responded to social changes which led people to perceive juvenile delinquency to be a social problem and one which, moreover, needed a special response. The Juvenile Delinquents Act recommended the establishment of a juvenile court, but left it up to the local authorities to decide whether a separate juvenile court was necessary. The quality of treatment given to juveniles varied greatly, but no effort to provide a more uniform method of dealing with juveniles was made until 1963.

Both County Court judges and magistrates were allowed to preside over juvenile courts. Later, justices of the peace or special judges designated for that purpose presided over juvenile courts. In 1954, the jurisdiction of the Juvenile Court was expanded to include matters under the Training Schools Act, the Deserted Wives' and Children's Maintenance Act and the Child Welfare Act. The name of the court was changed to the Juvenile and Family Court.

2.19 COUNTY AND SUPERIOR COURTS - 1913-1985

Between 1913 and 1967, only cosmetic changes were made to the higher courts. The names of the courts which made up the Supreme Court were changed twice. The County Court received more criminal jurisdiction, while that of the High Court was reduced.

Before the passage of the Courts of Justice Act, each County and District Court was an independent body and its judges were appointed to only one county or district. The District and County Courts were also made up of three different courts. The District and County Courts were courts of civil jurisdiction, but the judges of these courts also presided over two criminal jurisdiction courts. The Court of General Sessions of the Peace generally sat with a jury, while the County and District Judges' Criminal Court had non-jury criminal jurisdiction. The Courts of Justice Act provided that there would be one province-wide court called the District Court of Ontario. This change allowed judges to be moved to areas in the province where their services were needed.

In 1970, the Divisional Court was added to the Supreme Court. This court was given jurisdiction to review the decisions of administrative tribunals and also had some appellate jurisdiction. This appellate jurisdiction was expanded under the Courts of Justice Act in 1985, to allow the Divisional Court to hear appeals from civil judgments up to $25,000.

The Courts of Justice Act also provided a framework for a new set of rules, recommended by Walter Williston, and drafted by a subcommittee of the Rules Committee, headed by Mr. Justice Morden. In addition, the Act revised and consolidated the many statutes establishing and regulating the courts and their procedures.

2.20 THE FINANCING OF THE LOWER COURTS BEFORE 1967

Until the reforms of 1968, following the publication of the Report on the Inquiry into Civil Rights (the McRuer Report), these courts deserved the designation "inferior courts". They lacked funding, facilities, and properly trained personnel. These courts could also be described as "social" courts, and this was at the root of the lack of funding. In the 19th century, the administration of justice was concerned with disputes over property and crime. In

Canada, these concerns were reflected in the federal division of responsibilities. The federal government was given responsibility for criminal law and for appointing judges to the "Superior, District and County Courts" which were the courts which administered most of the law concerning property disputes and criminal law. These concerns were further reflected in the fact that the only lower courts which were required to be presided over by a legally trained judge were the Division Courts, which had jurisdiction to try minor civil disputes.

The lower courts handled minor crimes, provincial offences, juveniles, family matters and small civil matters. These courts were mainly organized, staffed and financed by the municipalities and the counties. The service provided by these courts depended entirely on the interest the community had in the matters handled by these courts and the amount of money available to be spent on them.

Before 1859, the municipalities were entirely responsible for financing the administration of justice. The municipalities were required to use their tax revenue to support a jail, a courthouse and all other expenses incidental to the administration of justice. Although the municipalities financed the administration of justice, any revenues in the form of fines went mostly to the province.

The only exception to this arrangement existed in the northern districts, where the province was entirely responsible for the administration of justice.

In 1859, the province took over the cost of financing the administration of "criminal" justice, which was confined to those matters which would now be found in the Criminal Code. The municipalities, however, remained responsible for maintenance of the court buildings and the salaries of court officers.

2.21 REORGANIZATION OF THE PROVINCIAL COURTS - 1967-1987

The report of the Royal Commission Inquiry into Civil Rights was released in 1968 and a number of important changes were immediately made to the provincial courts. The report criticized the piecemeal state of the lower courts. It criticized the payment of judicial officers through fees collected by the courts and it criticized the fact that many of the people presiding over these courts had no legal training. Too many of the judges were part time only and too many different types of judges presided over these courts.

As a result of the McRuer Report, the province took over full financial responsibility for the administration of justice through amendment of the Administration of Justice Act and a number of other acts. The Magistrates Court was renamed the Provincial Court (Criminal Division) and the Juvenile and Family Court became the Provincial Court (Family Division). Legally trained judges of at least five years experience at the bar were appointed to these courts. The experience requirement was later changed to ten years. Provincial Court judges were also given security of tenure. They can only be removed from office after a public judicial inquiry and upon recommendation to the Lieutenant Governor in Council.

The Provincial Court judges are appointed to the Provincial Court as a whole but are assigned informally to a particular division.

In 1979, the Provincial Offences Act was passed. The Provincial Courts Act was then amended to provide for a Provincial Offences Court to be presided over by a Provincial Court (Criminal Division) judge or a justice of the peace.

In 1970, legislation was introduced into the legislature to reorganize the Division Courts. They were re-named the Small Claims Courts and some of the smaller courts were closed. County Court judges heard the small claims cases. The monetary jurisdiction of the Small Claims courts was set at $1,000.

In 1980 an experimental Small Claims Court was set up in Toronto. It was called the Provincial Court (Civil Division) and its monetary jurisdiction was set at $3,000. It was presided over by Provincial Court judges or senior barristers appointed as deputy judges who worked on a part time basis. This court was made permanent in 1982 and, in 1985, all Small Claims Courts became Provincial Court (Civil Division) courts. The monetary jurisdiction of civil division courts outside Toronto remains $1,000.

Under the Courts of Justice Act, Provincial Court judges were given security of tenure comparable to that of the District and Supreme Court judges in that they are now removable only on an address to the Legislative Assembly.

2.22 CONCLUSION

This summary of the history of the Ontario courts shows that, with the exception of only a few periods, the history of the courts is a history of constant change and adaptation. Resistance to change is also a hallmark of the history of the courts. Changes which were considered too radical ever to occur were adopted, almost without a murmur, a few years later. The Ontario courts have survived because they have always adapted themselves to the needs of the people.

CHAPTER 3

The Present Structure of the Courts

3.1 INTRODUCTION

The present structure of the courts is not logical. It is the result of the combined effects of federalism, history and the tendency of governments and lawyers to seek ad hoc solutions to particular problems without considering the whole picture. This chapter will set out as clearly as possible the jurisdiction and internal structure of each court.

3.2 PROVINCIAL COURTS: GENERAL

The Courts of Justice Act establishes the Provincial Court as one court with three divisions. The Criminal and Family Divisions each have a chief judge and an associate chief judge, with the chief judge of the Criminal Division also acting as chief judge of Provincial Offences Court. The Civil Division has a chief judge but no associate chief judge or senior judges. Each chief judge has "general supervision and direction over the sittings of his or her court and the assignment of the judicial duties of the court..." (s. 63(5)). The chief judges are assisted by senior judges appointed by the Lieutenant Governor to various regions of the province. There are currently seven Family Division regions and eleven Criminal Division regions in the province. The senior judges work with the chief judges and they "supervise(s) the sittings and the assignment of the judicial duties of the court in [their] area." (s. 64(2)). The chief judges and associate chief judges all are located in Toronto.

The judges of the Provincial Court are appointed to the court as a whole and are assigned to their respective divisions by an informal process at the time of appointment. They are appointed by the Lieutenant Governor in Council upon the recommendation of the Attorney General (s. 52(1)).

3.3 PROVINCIAL COURT (CRIMINAL DIVISION)

There are 155 Criminal Division judges. The court sits continuously in 177 different locations, and also sits periodically in more remote locations where there is not a sufficient caseload for a full time court. The number of sittings depends on the demand in each location.

Section 61 of the Courts of Justice Act gives the Criminal Division judge broad jurisdiction to "exercise all the powers and perform all the duties conferred or imposed on a provincial judge by or under any Act of the Legislature or of the Parliament of Canada", and specifically a Criminal Division judge may "exercise all the powers and perform all the duties conferred or imposed on a magistrate, provincial magistrate or one or more justices of the peace under any Act of the Parliament of Canada". In practice this means that a Criminal Division judge can try indictable offences within his or her absolute jurisdiction under section 483 of the Criminal Code, or in respect of which the accused has elected to be tried by a Provincial Court judge. He or she can conduct preliminary inquiries and can try summary conviction offences under both the Criminal Code and the Provincial Offences Act. A Criminal Division judge can also conduct show cause hearings with respect to judicial interim release and can issue summonses, search warrants, bench warrants and committal orders. As a result of this broad jurisdiction, all criminal cases originate in the Provincial Court (Criminal Division) and 90% of criminal cases are disposed of in the Criminal Division.

Appeals from indictable offences go directly to the Court of Appeal. There are two types of appeal from summary conviction offences, what might be called an "ordinary appeal" and an appeal by way of stated case. The basic distinction between the two types of appeal is that an appeal by way of stated case is based on an error of law or an excess of jurisdiction. In an ordinary appeal, the contention is made that the Provincial Court judge came to the wrong conclusion on the facts. An ordinary appeal is taken to the District Court. An appeal by way of stated case is taken to the Divisional Court. Once an appeal by way of stated case is made, the applicant cannot take an ordinary appeal. Appeals lie from decisions on both these types of appeal to the Court of Appeal.

3.4 PROVINCIAL OFFENCES COURT

This court tries all offences under provincial statutes, such as the Highway Traffic Act. Although Provincial Court judges can sit in this court, generally justices of the peace try these matters.

Justices of the peace are appointed by the Lieutenant Governor pursuant to the Justices of the Peace Act. Some justices of the peace are full time personnel and are paid a salary. Other justices of the peace are part time only, and are paid on a fee basis. This latter situation may change in the near future if the recommendations of the Mewett Report are implemented.

Justices of the peace are currently appointed for the whole province and may exercise the jurisdiction conferred on them by provincial or federal legislation or by municipal by-law. There are four different categories of justice of the peace, depending on the extent of their powers. The four categories are as follows:

A - can preside at trials of summary conviction offences under provincial statutes or municipal by-laws,

B - can admit people to bail,

C - can issue search warrants, and

D - can receive informations, and issue summonses and warrants.

The first category is the broadest, with the last category being the narrowest. Each category can do everything that the categories below it can do, but cannot do anything that the categories above it can do. The Mewett Report has criticized this complicated delineation of powers and has recommended that two categories would be sufficient. In one category, a justice of the peace could perform adjudicative functions and in the second, only non-adjudicative functions could be performed.

Justices of the peace do not try young offenders who are charged under the Provincial Offences Act. These cases are heard by Provincial Court judges in either the Criminal or Family Division.

In the Provincial Offences Court cases can be prosecuted by non-legally trained provincial prosecutors. Historically, provincial offences were often prosecuted by police officers. The Pukacz Report, released in 1977, criticized the use of active police officers as public prosecutors. The practice has been discontinued, although retired police officers can, and do, act as provincial prosecutors. Not all courts have provincial prosecutors, and where there are no provincial prosecutors, crown attorneys appear in Provincial Offences Court.

3.5 PROVINCIAL COURT (FAMILY DIVISION)

The Family Division functions both as a family court and as a youth court. It tries all matters involving young offenders of 15 years or less under the Young Offenders Act, and the Family Division also sits as a Provincial Offences Court to hear provincial matters involving young offenders in this same age category.

There are 73 Family Division judges in Ontario and they exercise all the family jurisdiction not required by s. 96 of the Constitution Act, 1867 to be heard by the Supreme or District Court. As a result of s. 96, family law jurisdiction is fragmented. Outside of Hamilton-Wentworth, three different courts have jurisdiction to hear matters involving family law. They are the High Court of Justice, the District Court of Ontario, and the Provincial Court (Family Division). Listed below are the jurisdictional divisions in family law. Note that there is some overlapping.

Section 96 Courts	High Court of Justice	Divorce. Property division, including interim orders. Custody and access. Support.
	District Court	When acting as local judges of the High Court, District Court judges have jurisdiction to determine: divorce, custody and access ancillary to divorce, and support ancillary to divorce. Property division, including interim orders, custody and

		access, and support. (Under the authority of the Family Law Act)
Non-section 96 courts	Provincial Court	Wardship. Adoption. Child Protection (Child and Family Services Act). Custody and access, where not ancillary to a divorce. Support where not ancillary to divorce. Enforcement of all support orders. Young Offenders Act matters, where the accused is 15 years or less. Provincial Offences Act matters where the accused is 15 years or less.

Family law jurisdiction is further fragmented by the fact that some matters which are the responsibility of the provincial legislature can only be heard in a s. 96 court, while other matters which are the legislative responsibility of Parliament can be heard in the Provincial Court. The Family Law Act is a provincial statute which contains a structure for property division between spouses on dissolution of marriage. If there is a dispute over the division of property, it can only be heard in District Court or Supreme Court despite the fact that the legislation which will be applied is provincial. The legislation governing young offenders is federal, but a young person accused of committing a crime will be tried in either the Criminal Division or the Family Division of the Provincial Court.

Appeals from decisions of the Family Division are heard by different courts depending on the governing legislation. The bulk of appeals, however, go to the District Court.

3.6 PROVINCIAL COURT (CIVIL DIVISION)

This court is a recent creation of the provincial government, and its history is outlined in Chapter 2. The Civil Division in Toronto has a monetary jurisdiction up to $3,000. Full time Provincial Court judges handle cases between the previous $1,000 limit and the new $3,000 limit. Deputy judges continue to handle matters up to $1,000. Deputy judges are senior lawyers who are appointed by the Attorney General to act as part time judges. They are paid on a per diem basis. The monetary jurisdiction of the Civil Division courts outside of Toronto is $1,000. The Civil Division courts can be presided over by District Court judges, Provincial Court judges, or deputy judges.

The practice of using deputy judges varies from area to area. Some areas have a large pool of lawyers who are drawn on a rotating basis. Other areas in the province have a small pool of lawyers to draw on, or alternatively they rely on a retired judge or lawyer who does virtually all the small claims work.

There are currently thirteen Civil Division judges, ten of whom reside in Toronto. There is one judge who works in Ottawa, one in St. Catharines and one in Hamilton.

The rules of evidence in the Civil Division court are substantially relaxed.

An appeal can be taken to the Divisional Court from any final order involving more than $500.

3.7 UNIFIED FAMILY COURT

This court exists only in the Judicial District of Hamilton-Wentworth, and has been called, "an important anomaly in the curial landscape of the province." (Rae v. Rae (1984), 37 R.F.L. (2d) 16 at 18 (Ont. S.C.)).

The decision to establish a unified family court was the result of a growing consensus that family law clients were not being properly served by a system in which they had to bring cases in at least two courts. This position was articulated in the 1974 Working Paper on the Family Court released by the Law Reform Commission of Canada, and in the 1973 Report on the Administration of Ontario Courts of the Ontario Law Reform Commission.

In order to deal with the constitutional problems created by s. 96 of the Constitution Act, 1867, judges of the Unified Family Court are appointed by concurrent action of the provincial and federal governments. This appointing process has caused some problems because it is cumbersome and slow, and it is one of the main criticisms of the current structure of the Unified Family Court.

When the court was established, its purposes were set out as follows:

> Purposes of the Project:
>
> 1. To unify the exercise of jurisdiction in all family law matters exclusively in one court, rather than the four courts [since reduced to three courts] now exercising that jurisdiction, in order to
>
>   a) reduce delay and inconvenience to the public in the resolution of family disputes;

   b) reduce duplication of court staff and facilities;

   c) reduce expenditures in legal aid resulting from delays and duplication of proceedings;

   d) eliminate delays and expense to the parties, goverment and legal aid resulting from lack of jurisdiction or jurisdictional overlap;

   e) provide for more efficient and economical use of community social service resources in the resolution of family disputes;

   f) avoid dealing with family problems on a piecemeal basis or without regard to the whole picture;

   g) develop a group of judges who are specialists in dealing with all kinds of family problems;

   h) ensure that there is a constant judicial philosophy and a common network of social service resources brought to bear in all family disputes.

2. To provide a court that is readily accessible to unrepresented persons and to lawyers and their clients, by means of

   a) a physical plant that is not confusing or intimidating;

   b) rules, procedures and forms that are simplified and streamlined.

3. To provide a court that is flexible enough to achieve a resolution of both simple and complex matters, by means of

   a) rules, procedures and forms that produce an expeditious hearing and at the same time a full and fair hearing;

   b) physical plant which lends itself to simple and small cases as well as to complex and large ones.

4. To encourage resolution of family disputes by settlement between the parties, through the use of

a) conciliation and referral to outside social service agencies;

b) prehearing conferences;

c) adjustment conferences where an enforcement problem arises after an order has been made;

d) rules and procedures encouraging resort to these facilities.

The Unified Family Court was established as a completely separate court. It is not formally attached to the provincial court system, the District Court or the Supreme Court, but functionally it operates as part of the Provincial Court system. It is dealt with separately in the Courts of Justice Act, and it deserves its title "unified" because it is truly a one-tiered court. The judges of the Unified Family Court have all the powers of a Provincial Court judge and a District Court judge. They are also appointed as local judges of the High Court, and may exercise all the powers of a local judge except with respect to prerogative remedies. They also have parens patriae jurisdiction. Finally, a Unified Family Court judge has all the powers of a magistrate under the Criminal Code, may sit in the Provincial Offences Court where a young offender has been charged with committing an offence under the Provincial Offences Act, and can convene a youth court to deal with matters under the Young Offenders Act.

There are five permanent judges of the Unified Family Court currently, with several other District Court judges being designated as judges who can sit in the Unified Family Court if necessary.

As it is currently structured, the Unified Family Court has extensive jurisdiction over the resolution of matrimonial disputes. It has jurisdiction to determine all matters which arise under the Acts listed below.

	Statutes	Provisions
1.	Annulment of Marriages Act (Ontario) (Canada)	All
2.	Child and Family Services Act, 1984	Parts III, VI and VII
3.	Childrens' Law Reform Act	All, except ss. 60 and 61
4.	Divorce Act (Canada)	All
5.	Education Act	ss. 29 and 30
6.	Family Law Act	All, except Part V
7.	Marriage Act	ss. 6 and 9
8.	Minors' Protection Act	s.2
9.	Reciprocal Enforcement of Maintenance Orders Act, 1982	All
10.	Young Offenders Act (Canada)	All

With respect to the Young Offenders Act, in practice, the Unified Family Court only deals with young offenders aged 15 years or less. By virtue of s. 47(1) of the Courts of Justice Act, the Unified Family Court can also hear criminal charges such as those involving interspousal assault. These matters are ordinarily heard in the Criminal Division of the Provincial Court.

In order to encourage families to resolve their disputes on their own, the court has a conciliation service attached to it. This service is strictly voluntary and generally deals only with custody and access problems. These matters are considered to be peculiarly appropriate for mediation, because any resolution which both parties are happy with is also a resolution which both parties are likely to respect. A similar service is also offered in the Family Division of the Provincial Court in some locations.

The Unified Family Court has its own rules of procedure. They are almost identical to the Provincial Court (Family Division) rules and are designed to provide simple and expeditious service to unrepresented litigants. In more complex matters the parties can either apply for directions from the judge as to how to proceed, or request that one or more of the Supreme and District Courts' rules apply.

In order to determine what appeal route must be taken from a decision of the Unified Family Court, one must look first to the legislation under which the order was made. If the legislation provides for an appeal to a court other than the District Court, then the appeal is taken as set out in the legislation. Since Unified Family Court judges are also technically District Court judges, it would be inappropriate for a District Court judge to sit on an appeal from the decision of a Unified Family Court judge. If the legislation provides for an appeal to the District Court, the appeal goes instead to a High Court judge.

If the legislation does not provide for an appeal, then the Courts of Justice Act sets out a series of appeal routes depending on the type of order and the amount involved. Interlocutory orders which were made by a judge acting as a local judge of the High Court are appealed to the Divisional Court. If the interlocutory order would ordinarily have been made by a District Court judge, then the appeal would be made to a High Court judge. A final order involving $25,000 or less is appealed to the Divisional Court, but if the amount of the order is more than $25,000 the appeal is made to the Court of Appeal.

3.8 DISTRICT COURT

As part of the re-organization of the courts brought about by the Courts of Justice Act, the County and District Courts became a single province-wide court. This change gave the chief judge more flexibility in allocating judicial resources across the province. This re-organization was recommended by the Ontario Law Reform Commission in its 1973 Report on the Administration of the Ontario Courts Part I [at 162].

The administrative structure of the District Court consists of a chief judge, an associate chief judge, both of whom reside in Toronto, and a senior judge for each county or district with more than one judge. There is a total of 145 District Court judges and 17 supernumerary judges. Supernumerary judges are part time judges, who have usually worked as judges long enough to be eligible for retirement, but who have not yet reached the mandatory retirement age of 75 years. Judges who are in that category can elect supernumerary status, or they can continue to work full time. If they elect to go supernumerary, they can continue to perform all the duties of a full time judge, and they generally work half time. Supernumerary judges also can be found in the Court of Appeal and the High Court.

The chief judge has general supervision and direction over the sittings of the court, as well as the assignment of judicial duties. The senior judges are actually in charge of the sittings and assignments of the judges in their respective areas, and they work with the chief judge. Like the Provincial Court, the District Court is organized into regions for administrative purposes, but the District Court is organized into eight regions, the boundaries of which do not coincide with the boundaries of the Provincial Court regions.

The District Court has jurisdiction to hear and determine any action, so long as both parties consent, with the exception of actions involving prerogative remedies. The District Court has civil jurisdiction in cases where the amount involved is $25,000 or less. If the action involves an amount in excess of $25,000, either of the parties can request that the action be moved into the Supreme Court, or the action may be started in the Supreme Court. If the action involves an amount of $1,000 or less, the matter may be heard by the Provincial Court (Civil Division), although, as noted earlier, a District Court judge may preside over that court.

The District Court, therefore, has a very broad jurisdiction, and has the same powers as the Supreme Court to conduct proceedings, grant remedies and enforce orders on any matter within its jurisdiction. It has jurisdiction to punish contempt of court, but it is limited in the contempt orders it can make. It can order a fine not exceeding $10,000 and a jail term not exceeding six months.

As with the Unified Family Court, the appeal routes of the District Court depend on the type of order and the amount involved. Appeals from final orders of the District Court go to the Divisional Court if the amount in dispute is $25,000 or less. If the amount exceeds $25,000, the appeal will be taken to the Court of Appeal. Appeals from interlocutory orders of the District Court are taken to the High Court of Justice. Appeals from interlocutory orders of a District Court judge acting as a local judge are heard in the Divisional Court.

3.9 SURROGATE COURT

The Surrogate Court is a separate court, but all its judges are also judges of the District Court. Traditionally, the Surrogate Court heard matters involving wills, estates, guardianship applications and adoptions. Currently, the Surrogate Court only deals with wills and estates. The Surrogate Court has no inherent jurisdiction, it is a creature of statute only. It is the function of the Surrogate Court to grant letters probate, so that a deceased's assets can be distributed according to his or her will. If there is no will or the will fails to name an executor, then the court will grant letters of administration to a next of kin or other authorized person and the deceased's assets will be distributed according to the formula set out in the Succession Law Reform Act. Both these procedures are largely administrative. However, if there is a dispute over whether a will was properly drawn up, a judge will hear testimony in court to determine whether the will is proper. This procedure is known as proof in solemn form and it is rarely invoked.

Appeals from the Surrogate Court are taken to the Divisional Court.

3.10 ASSESSMENT OFFICERS

The masters and the registrars of both the Supreme and District Courts are also appointed as assessment officers. Assessment officers hear assessments of court costs. If one party is ordered to pay the costs of the other party at the end of a proceeding, the amount to be paid is determined by an assessment officer. Assessment officers also hear assessments of solicitors' bills of costs, where the client is unhappy with the amount he or she is being asked to pay for the services of his or her lawyer.

Appeals from the decision of an assessment officer are heard by a judge of the High Court.

3.11 SUPREME COURT OF ONTARIO - HIGH COURT OF JUSTICE

The High Court of Justice is the trial division of the Supreme Court. Under the English common law system, a superior court derives its jurisdiction directly from the Crown. The High Court of Justice is therefore a court of inherent jurisdiction and is not subject to supervisory control except through appeals to the Court of Appeal. The High Court has plenary judicial power in civil and criminal matters in the Province of Ontario. The hallmarks of a superior court are the power to punish for contempt, to supervise and review proceedings of inferior courts and to prevent abuse of process by summary proceedings. As was noted in the previous section on the District Court, a number of these powers have been conferred on the District Court by statute.

The High Court has 55 judges, including six supernumerary judges, the chief justice and the associate chief justice. The judges are required by the Judges Act to reside in Toronto, although individual judges are exempted from that requirement. The judges, therefore, sit mainly in Toronto and visit the county towns on circuit. There are permanent sittings of the High Court in London and Ottawa. The High Court judges visit the other county towns twice yearly. In some of the smaller centres, one of the sittings may be cancelled, so that a High Court judge will only come into town once a year.

The circuit system was inherited from England in the 18th century, and it was a system which functioned well in colonial Upper Canada when the demand for High Court judges was low and travel was difficult. The sittings generally combine civil and criminal cases. All criminal matters must be dealt with first because the liberty of a citizen is at stake. Once the criminal cases have been exhausted, civil cases can be heard. In the smaller centres, where there is only one sitting a year, civil cases may not be reached before the time period allotted is over and, therefore, there can be substantial delays before a High Court civil case is heard.

The number of full time judges is augmented by supernumerary judges.

3.12 HIGH COURT OF JUSTICE - CRIMINAL JURISDICTION

The High Court generally tries only the most serious criminal cases, and the judges almost always work with a jury. There are two situations in which a High Court judge may hear a case without a jury. The Combines Investigation Act specifically provides that matters heard under that Act will be heard by judge alone, and s. 430 of the Criminal Code also provides that with the consent of the accused and the crown, a case may be tried by a High Court judge alone.

Certain serious offences, set out in s. 427 of the Criminal Code, are reserved to the High Court only. The bulk of indictable offences are within the concurrent jurisdiction of the District Court and the Criminal Division of the Provincial Court. The High Court generally hears only those matters within its exclusive jurisdiction. In cases of unusual difficulty which fall within the concurrent jurisdiction of the High Court and District Court, crown prosecutors generally elect to proceed in the High Court of Justice. The list of exclusive matters has shrunk steadily over time. Of the crimes which remain, only murder, accessory after the fact to murder, and conspiracy to commit murder are important. The other crimes are somewhat exotic, like treason, alarming her Majesty or intimidating Parliament.

3.13 HIGH COURT OF JUSTICE - CIVIL JURISDICTION

The High Court has unlimited civil jurisdiction, although in practice it hears matters only where the amount of the claim exceeds $25,000. It is the only court which has jurisdiction to grant prerogative remedies, such as habeas corpus, and it hears all bankruptcy cases, since the Bankruptcy Act requires a superior court to try bankruptcy matters. The High Court also has some limited appellate jurisdiction, and hears appeals from interlocutory decisions of the District Court.

3.14 HIGH COURT OF JUSTICE - FAMILY LAW JURISDICTION

Outside of Hamilton-Wentworth, the High Court of Justice is the only court which is authorized to try divorce cases. Since the High Court would be swamped with divorce cases if they all had to be tried by High Court judges, in practice the vast majority of uncontested divorces are dealt with by District Court judges acting as local judges of the High Court. Outside Toronto, local judges also hear most contested divorces. In Toronto, the High Court has established an informal family law division to hear divorce cases. This division is made up of High Court judges who hear contested matters, one master who hears family law motions, and several family law commissioners who hear contested matters on references.

The position of commissioner is unique to the High Court and its background deserves to be explored. In 1975, then Chief Justice Estey organized a review of the conduct of family law at the High Court level. The result of the review was that in 1976, all family matters were removed from the regular lists and the informal family law division of the High Court was created. One judge of the High Court was put in charge of the division, one master was assigned to deal specifically with family law motions, and one judge was made available on a rotating basis to deal with motions, pre-trials and trials. All family matters were dealt with in a separate building.

The new system helped clear out some of the backlog, but there were still problems with the lack of sufficient judgepower to cope with the workload. In 1978, the office of family law commissioner was created to help with the workload. Initially, the commissioners, who were mainly retired judges, only did pre-trials. Later, the commissioners began presiding over hearings referred to them by a High Court judge on consent of both parties.

This procedure, called a reference, is now codified in Rules 54, 55 and 70.21 of the Rules of Civil Procedure. Before a commissioner can preside over a hearing, the parties to a case must obtain a consent order from a High Court judge directing a reference of the matter to be heard by a commissioner. The commissioner then hears the matter and makes a report. The report goes to the referring judge, where it is confirmed if both parties are satisfied with the result. Alternatively, the parties make submissions concerning the report, after which the judge may reject, confirm, or vary the report. If one of the parties is still dissatisfied, they may appeal the confirmation.

The jurisdiction of the family law commissioners is quite broad. They can hear all family matters that a High Court judge would hear, with the exception of entitlement to divorce. Commissioners have recently begun to do some pre-litigation mediation if both parties so request. Any matters heard by a commissioner are heard on consent of both parties, and no party can be required to go before a commissioner. The family law commissioners are used by counsel in part because matters heard by a commissioner are heard more quickly, and in part because the commissioners have established a good reputation and their reports are not often rejected or varied by the judges.

There are currently three full time commissioners, one in Ottawa and two in Toronto. There are also two part time commissioners, both of whom work in Toronto. The part time commissioners only do pre-trials.

3.15 MOTIONS COURT

Both High Court judges and masters hear Supreme Court motions, depending on the type of motion. We will discuss the masters and their jurisdiction below. Motions court in the Supreme Court is called Weekly Court, because originally it sat once a week. Presently, however, Weekly Court sits every working day of every week of the year. It is in Weekly Court that counsel bring motions concerning the procedure in a Supreme Court action.

A High Court judge can hear any motion in a case pending in the High Court. A local judge of the High Court can hear any motion that a High Court judge can hear except a motion to vary an order made by a High Court judge, an order made under certain sections of the Judicial Review Procedure Act, a motion to transfer a case to the High Court and a motion to have a divorce case heard by a High Court judge instead of a local judge.

The power of masters and local judges of the High Court to hear Supreme Court motions has been steadily expanded to the point where the present Rules of Civil Procedure simply list the types of motions which cannot be heard by masters or local judges.

3.16 SUPREME COURT OF ONTARIO - MASTERS

The masters, like the family law commissioners, are another unique feature found only in the Supreme Court. Masters are lawyers who hear procedural motions concerning Supreme Court cases as well as performing a number of other adjudicative functions.

A master can hear any motion in an action pending in the Supreme Court except motions specifically reserved by statute to a judge, motions to vary an order of a High Court judge or a local judge, motions where one party is under a disability, a motion relating to the "liberty of the subject", and a motion under certain sections of the Judicial Review Procedure Act.

3.17 SUPREME COURT OF ONTARIO - DIVISIONAL COURT

In accordance with recommendations made in the McRuer Report, an appellate division of the High Court of Justice was set up in 1970 to handle judicial review of decisions of administrative tribunals, statutory appeals, appeals by way of stated case, appeals from the Provincial Court (Civil Division) and appeals from masters' decisions. The Courts of Justice Act has greatly expanded the appellate jurisdiction of the Divisional Court. It now hears all appeals from civil judgments, where the amount involved does not exceed $25,000.

The Chief Justice of the High Court is the head of the Divisional Court, and its only permanent member. High Court judges sit in the Divisional Court in panels of three, on a rotating basis. The panels of judges hearing cases in the Divisional Court are constantly changing. As a result, the Divisional Court is not a truly separate entity. A single judge may sit in the Divisional Court for certain types of appeals such as an appeal from the Provincial Court (Civil Division) or a motion for leave to appeal a decision to the Court of Appeal.

The Divisional Court, in essence, functions as an intermediate court of appeal.

3.18 SUPREME COURT OF ONTARIO - COURT OF APPEAL

The Court of Appeal is the highest court of the Province of Ontario. Only the Supreme Court of Canada constitutes a higher court, but it hears only a very small percentage of the appeals generated in Ontario, with the result that for most cases, the Court of Appeal is the court of last resort for the residents of Ontario.

The Court of Appeal hears only appeals. It is not a court of first instance and the Court of Appeal's decisions are reviewable only by the Supreme Court of Canada. It consists of sixteen judges, including the chief justice and associate chief justice. There are also two supernumerary judges. The court sits in panels of three or five judges depending on the seriousness of the case.

The Court of Appeal sits in Toronto, and does not travel to other centres, with the exception of Kingston. In Kingston, the court hears prisoner appeals from inmates of the federal penitentiaries.

3.19 CONCLUSION

The structure of the court system is not, as was said at the outset, logical. There is overlapping jurisdiction, as well as fragmented jurisdiction, which make it difficult for both the public and lawyers to know exactly where a case should be tried. Once a case has been tried, it is not immediately clear where the appeal should be taken. Appeals originating from one court may go to several different appeal courts without there being any apparent reason for the distinction.

CHAPTER 4

Problems and Complaints

4.1 INTRODUCTION

As long as there have been courts, there have been complaints that they are not functioning properly. Roscoe Pound pointed this out in his address to the 1906 American Bar Association annual convention when he said,

> Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor, and the king exhorts that the peace be kept better than has been wont, and that "men of every order readily submit...each to the law which is appropriate to him." [at 1]

There will always be people who believe that the law is designed to prevent people from being independent and that the administration of justice will therefore result largely in injustice. However, when the complaints become persistent and when they focus on the same issues time after time, then perhaps there are matters which need to be addressed and problems which need to be corrected. This chapter will set out some of the problems and complaints which have been raised concerning the administration of justice, and about which there appears to be some consensus.

4.2 COSTS

The most common complaint about the justice system is that the cost of litigation is prohibitive.

It is generally conceded that only the very wealthy, or the poor on legal aid, can afford to go to court. With the exception of matters within the jurisdiction of the Provincial Court (Civil Division), civil cases of less than $5,000 may not be worth taking to court because the costs will equal or exceed the amount in issue. Even minor criminal matters can be expensive to defend, making it more attractive to plead guilty, since the fine will cost substantially less than any legal fees. The cost of litigating property division disputes in matrimonial cases has been known to exceed the value of all the assets accumulated by the divorcing couple.

Compounding the expense picture is a system of awarding costs at the end of a case which rewards inefficiency and prolixity by basing the assessment of costs on the number of motions, days at trial, and hours spent on preparation. Legal aid fees are calculated in much the same manner.

Assessment officers have noted that costs have risen dramatically over the last two to three years. Once upon a time, a bill of costs assessed on a party and party scale represented about two-thirds of the costs the client would actually have to pay. Currently, that proportion has shrunk to less than one-half of the bill of costs.

This fact directly affects the amount which the winning litigant can actually expect to receive after he or she has paid the solicitor, and the losing litigant has paid the judgment, interest and assessed costs. From a cursory examination of typical bills of costs in the District Court and the High Court of Justice it was apparent that, after a winning litigant has paid his or her lawyer, only 20 to 30 percent of a District Court judgment (including interest and costs) will remain. This proportion rises to 40 to 60 percent of a judgment in the High Court.

The Inquiry conducted a survey of the average cost of certain types of civil cases in the District Court. The detailed results of this survey are contained in Appendix 2. The survey showed that an average bill of costs, assessed on a party and party basis, was nearly $4,000. Preparation for trial and the counsel fee were the most expensive items on the bill, representing slightly more than one-half of the total bill.

When it is remembered that an assessed bill of costs represents less than one-half of the actual bill a solicitor would present to his or her client, it is not difficult to understand how even a winning litigant can end up with little more than a paper victory. One assessment officer told the Inquiry that he had assessed costs in the District Court which exceeded the monetary jurisdiction of the District Court (i.e. $25,000).

4.3 DELAY

The second most common complaint is that a case takes too long to get to trial.

Delay and backlog vary from court to court and from county to county. The causes of delay are many and varied. American research has shown not only that there are many different causes of delay, but also that correcting any one cause in isolation will not substantially improve the situation. Only reforms which attack delay on several fronts will serve to reduce delay noticeably and permanently. There is no doubt that in Ontario, every group which works in the justice system contributes, to some degree, to the problem of delay.

Some people might suggest that, since everyone contributes to delay, delay is therefore simply the cost of doing business in the courts and that nothing can or should be done to correct the problem. However, as the Civil

Justice Review published by the Lord Chancellor's department in England noted,

> Delay keeps litigants out of their entitlement, imposes hardship and forces economically weaker parties to accept terms of settlement which do not reflect the real merits of the case. Delay also undermines the court's ability to do justice by eroding the availability and reliability of evidence. The burden of cost (which may not fall on the party most able to bear it) may be heavy, and the total cost to the parties may often exceed the compensation recovered, even in cases settled without a trial. Fear of cost, whether justified or not, certainly inhibits access to justice and, like delay, may force weaker parties to accept unfair terms of settlement. [at 48]

4.4 DELAY IN THE PROVINCIAL COURT (CRIMINAL DIVISION)

Delay in the Criminal Division has become acute in certain areas of the province. The survey which the Inquiry conducted on delay showed that Brampton had the greatest backlog in the province with a waiting period of one year regardless of the anticipated length of trial. Brampton was closely followed by Windsor and Ottawa, both of which were setting trial dates eight to ten months in the future. This kind of delay was not uncommon throughout the province, although there was no consensus among lawyers, judges and administrative staff concerning the cause.

Among the suggested causes of delay is the number of appearances which an accused makes before either a guilty plea is entered, or a trial takes place. An accused can appear in court four or five times for the sole purpose of stating that he or she has accomplished one step in the procedure and to be advised what the next step ought to be.

This situation can be compounded by lawyers, particularly in areas where a small number of lawyers handle a very high proportion of the criminal cases. In these counties, both judges and courtrooms may be available, but the lawyers may have prior commitments in other courts and may not be available for many months. If a matter is also adjourned once or twice, the delay is increased dramatically.

Another procedure which has caused mixed feelings is the preliminary hearing in criminal cases. It is felt by some people to be an important part of an accused's rights and the solution to inadequate crown disclosure. By other lawyers, it is seen as an unnecessary process which not only delays the conclusion of the case, but also gives an accused two full hearings at enormous expense to the public. These lawyers state that an improved system of crown disclosure would eliminate the necessity for a preliminary hearing, thereby streamlining the process, and reducing both delay and cost.

There are two further procedures in the criminal law field which are considered to be causes of delay. The first is the system of crown disclosure, which defence lawyers feel is a process which is too discretionary, despite guidelines issued by the Attorney General. Defence lawyers also complain that the process varies widely, depending on the particular crown attorney who makes disclosure. They complain that it is difficult to find which crown attorney can make disclosure, and once found the crown attorney may not have carriage of the matter, making it impossible to settle the case.

The problem with the procedure of crown disclosure has partially led to the creation of the second problem: too many elections. Defence lawyers have stated that one of the reasons that they elect out of Provincial Court is in order to get the undivided attention of a crown attorney with whom they can talk about disclosure, and possibly a plea. In the Provincial Court, it is difficult to find someone who has the authority to settle a case and who can spend time with the defence lawyer. Too often, the press of dozens of cases, all waiting to be heard, and all competing for the crown attorney's attention, make any quiet discussion an impossibility.

4.5 DELAY IN THE CIVIL COURTS

In civil matters, all the various steps involved in litigation may contribute to the overall backlog in the system. There are too many motions, and discovery takes too long. The pre-trial procedure has been pointed to as a cause of delay. Some advocates and judges consider it to be entirely unnecessary, others believe that pre-trials can reduce delay, but they are frustrated by a procedure which often accomplishes nothing. One of the major problems with the procedure is the very lack of consensus in the legal community as to its usefulness. If only one of the people at the conference feels that time is being wasted and is not, therefore, willing to participate wholeheartedly, then the entire process will be frustrated.

Currently, cases on the civil non-jury list in the High Court in Toronto are taking not less than a year just to reach the pre-trial stage. Despite the lack of consensus on the usefulness of this procedure, 40 to 60 percent of cases settle at or after the pre-trial. This high attrition rate does not resolve the problem of backlog, however, because civil non-jury cases must wait a further six to eight months after the pre-trial before going to trial. It also must be remembered that these are Toronto cases, and the High Court sits continuously in Toronto. The situation outside of Toronto, where there are periodic sittings only, may be worse.

Finally, some people feel that the major problem with the justice system is our society's litigiousness. They argue that there is an unnecessary emphasis on the adversary process and that in some cases, alternative methods of dispute resolution would be more appropriate. This argument is felt to be particularly true with respect to family matters. Advocates of alternate dispute resolution point to the high cost, both emotionally and financially, of family law litigation.

4.6 INEFFICIENCY

The most obvious and pressing problem with the administration of the courts is the fact that it is inefficient. Millar and Baar in their book, Judicial Administration in Canada, have described the administration of the courts in the following fashion:

> Administrative inefficiencies are reinforced by confusion and disagreements as to where the line is to be drawn dividing judicial from administrative responsibility and authority. Not infrequently it is done at a point which reflects the unique personalities of individual judges and court clerks, rather than on any basis of principle. This is the fault neither of judges nor of court clerks and administrators. It is the result of a system, or rather of a fractured mosaic of individual fiefdoms, which has grown historically in response to immediate needs, short-term planning, political and budgetary expediencies... [at 5]

The administration of the courts is not integrated. Even where there may be more than one court in a building, each court has its own administrative structure and rarely does anyone working for one court have more than a hazy idea of what is going on in another court. The movement of paper from one court to another is a monumental task even though the administrative offices may be side by side, and paper moves regularly between the courts, as it does between the Provincial Court (Criminal Division) and the District Court. Clerks in one office may be working overtime on a regular basis, while in another office they may be idle. Courtrooms also become the exclusive possessions of certain courts, preventing any possibility, when there is an overflow of business, of using an empty courtroom "owned" by another court. When one court has no courtrooms available, it must shut down, thereby creating or aggravating any backlog. It is almost trite to point out that this is an inefficient method of managing an organization the size of the court system.

4.7 FINANCIAL ARRANGEMENTS IN THE COURTS

The problems in the administration of the courts are not helped by the fact that there is a chronic lack of funding. The budget for the administration of justice in the province of Ontario in the last 20 years has made up less than 1% of the government's total budget. Since 1969, when the provincial government took over the financing of the administration of justice, the percentage of the total government budget allotted to the justice system has declined by one half.

The way in which the government manages the funds also creates problems. Each court office has only a very low limit on the amount which it is allowed to spend on its own authority. Any larger item, such as the purchase of a typewriter or a large amount of photocopying has to be ordered through Toronto, where much time is lost waiting for approval. Some courts have taken to requesting their suppliers to bill them several times, in small amounts, so that the item can be paid for out of the funds authorized to be spent locally. Such antics are demeaning to professional administrators.

4.8 HIRING ARRANGEMENTS IN THE COURTS

The hiring of court staff is equally tightly controlled. If one of the courts in Thunder Bay wants to hire a new filing clerk, someone must fly up from Toronto to participate in the interview and the final hiring decision.

Senior management positions in the local offices are often political appointments. This creates two types of problems: the senior managers are not professional court managers, which adds to the lack of efficient administration in the court system; also, personnel who have worked their way up through the administrative ranks and who have an intimate knowledge of how the courts are run find that the most senior jobs are forever out of their reach. The inability to rise in the administration causes frustration and a lack of desire to work for greater achievements.

4.9 IMPLEMENTATION OF LEGISLATION

The orderly implementation of new legislation is affected by the shortsightedness of governments. The Young Offenders Act presents an example of this type of problem. The government passed the new legislation without assessing its impact on the courts. Once the impact was apparent, no funds were available to fully and properly implement the new legislation because it was a time of fiscal restraint. This failure to fund the implementation of legislation prevents good legislation from having the effect that it should have, and can cause disillusionment in the public.

4.10 COMPLEXITY

In Chapter 3, the present structure of the courts in Ontario was described. There appears to be no doubt that the system is overly complicated and that few people understand it. Newspaper reporters who are frequently in court are often wrong in their description of which court heard the matter about which they are reporting, and even lawyers have difficulty giving a full, accurate description of the jurisdiction of each court in the system.

Part of the problem stems from the fact that there is both overlapping and fragmented jurisdiction. In criminal matters, while there are some areas of exclusive jurisdiction in the High Court and the Provincial Court (Criminal Division), the majority of cases can be tried in any of the three levels of courts.

In family matters, the fragmentation of jurisdiction is a particular hardship. The orderly resolution of the breakup of a marriage may require two actions, brought in two different courts, with all the attendant costs and frustration.

4.11 THE UNIFIED FAMILY COURT

The Unified Family Court was an experiment designed to solve the problem of fragmented jurisdiction. It is an experiment that has become a permanent complication in the structure of the court system, and one which moreover creates some inequity in the province. Families living in Hamilton-Wentworth do not have the problem of fragmented jurisdiction, while everyone else in the province does. The Unified Family Court is an experiment which, after 10 years, has either succeeded or failed. If it has succeeded then it is time to extend it to the rest of the province. If it has failed, then it is time to abolish it.

4.12 THE PROVINCIAL COURT (CIVIL DIVISION)

The jurisdiction of the Provincial Court (Civil Division) is not uniform. When the experimental Civil Division court was set up in 1979 in Toronto, it was given a monetary jurisdiction of $3,000. All other small claims courts had a monetary jurisdiction of only $1,000. When the project was made permanent and all small claims courts became part of the Provincial Court (Civil Division) the two different monetary jurisdictions remained. This inequality in the monetary jurisdiction has created a unique problem.

Credit card companies and lenders have adjusted their contracts with their clients so that they can sue for unpaid debts anywhere in Ontario. Clearly it is to the advantage of a debt collector to use the inexpensive procedures of the Civil Division court in Toronto to recover debts over the $1,000 limit. This situation, however, works to the detriment of defendants living outside Toronto. The travelling costs involved in coming to Toronto to defend their claim, if a defence is available, may be too high to make the effort worthwhile.

4.13 ACCESSIBILITY

The public's perception that the courts are only for lawyers extends to public access to the courts. There are many types of access to the courts, including physical access, economic access and intellectual access, but one of the most important forms of access is geographical. Many areas in the province feel that they are not adequately served by the courts. In the more remote communities, particularly in northern Ontario, the nearest courts may be hundreds of miles away, forcing people to travel long distances to make an appearance in court that may ultimately prove to have been a waste of time and money because they have to return on another day.

Even in large communities in southern Ontario, access, particularly to the High Court, is seen as a problem. Each county town is entitled to a sitting of the High Court, twice a year. Toronto, London and Ottawa are the only cities in which the High Court sits continuously. The circuit system leaves the impression that the High Court is essentially a Toronto court.

4.14 THE PUBLIC

The general public are constant participants in the administration of justice. They appear as accuseds, litigants, victims, witnesses and jurors. In each of these roles, they have an opportunity to assess the justice system. The complaints the general public make about the administration of justice stem largely from the impression given by the courts that they are designed by and run exclusively for the benefit of lawyers.

The criminal justice system, in particular, comes under attack. A common refrain is that criminal law protects the accused, but ignores the needs of the victims and witnesses. No one explains anything to those attending court, and whether they are there as victims, witnesses or jurors, they are not treated with respect.

When an accused or a victim arrives in court, they are given little or no information concerning what will occur and what is expected of them. If an accused has a lawyer, the lawyer will usually explain the procedure, but a victim may have a difficult time getting the crown attorney's attention long enough to have the process explained.

The public generally feels that they are treated with lack of respect by both judges and lawyers. Not only is nothing explained, but lawyers and judges arrive late, matters are adjourned without witnesses being given any advance notice, witnesses wait all day, only to be told that their evidence is no longer necessary or that they must come back another day. In court, the lawyers and judges speak in such a fashion that they cannot be heard by the people seated in the main body of the courtroom, or, when they are heard, they speak an incomprehensible legal jargon, leaving even the accused puzzling over the disposition of his case.

4.15 COURT SITTING HOURS AND OFFICE HOURS

The submissions which the Inquiry received from members of the public expressed concern over the fact that court does not sit for a full working day. While some courts do work a full court day, from ten o'clock in the morning, until four thirty in the afternoon, provincial statistics on court sittings hours have shown that, on average, courts in Ontario sit for 2.6 hours per sitting day. In part, these short court days are due to a failure to overbook the court lists sufficiently to allow for settlements and adjournments. This situation is also created sometimes by the judges' desire to clear more time for research and judgment writing.

The business hours of the administrative offices are also perceived by the public to be inconvenient. Most administrative offices are open to the public from 9:30 to 4:30, even though the employees arrive at 8:30 in the morning. Court offices and the courts themselves are almost never open late, in the evenings, or on weekends. Members of the public have stated that these business hours cause substantial inconvenience to the average person who is at work during the hours when the administrative offices are open and when court is sitting.

4.16 QUALITY OF ACCOMMODATION

It is said that court may be convened wherever the judge chooses to preside. In some areas, however, the choice of court location threatens to bring the administration of justice into disrepute. Some courts are housed in shopping centres, in hotels, beside taverns, or in one case, in a Lions Club dance hall, right beside the bar, over which is hung a toilet seat.

4.17 COURTHOUSE SECURITY

In these ad hoc court locations, security becomes a major problem. Even in regular courthouses, security can be a problem, because either the courthouse was not designed with security in mind, or because renovations to the courthouse have altered the original security features. Added to this situation is the fact that there is an ongoing dispute over who should be responsible for court security.

4.18 COURTHOUSE DESIGN

Both the design of courthouses and the design of courtrooms varies greatly. There are some courtrooms with blatant design flaws, such as no secure way to bring accused persons into the courtroom, or no secure way for the judge to get in and out of the courtroom. There are courtrooms where the prisoner's dock is too close to the bench, or in other instances it is so glassed in that the accused has difficulty hearing. There are also courtrooms where the witnesses are placed in such an awkward fashion that they are difficult to hear.

Design flaws are also created when an otherwise well designed courthouse is altered to create more courtrooms or office space. The elements which usually suffer the most in these alterations are the waiting rooms, jury rooms and consultation rooms, all of which make the courthouse more inconvenient for the public.

4.19 CONCLUSION

It is not possible or even likely that this Inquiry can address every complaint made with respect to the administration of justice in this province. Some earnest complaints made to this Inquiry in effect asked for intervention in specific cases to redress what was alleged to be an injustice. Other complaints such as those respecting the insensitivity of the criminal law to the plight of the victim stem from the state of the substantive law and are outside the terms of this Inquiry.

Additionally, it must be recognized that the justice system deals with conflict between individuals and between the state and individuals. There are winners and losers. It is therefore unlikely that the justice system will ever be the subject of total admiration. However, many of the complaints addressed to the Inquiry are well founded and the problems contained therein are susceptible of solution. In the next chapter, some of the principles which should guide the resolution of these problems will be examined.

CHAPTER 5

General Principles Underlying Court Reform

5.1 INTRODUCTION

The reform of the justice system requires that certain principles be kept in mind. These principles are fundamental to the structure and management of the justice system, and ensure that the system fulfills its ultimate purpose, that of serving the public.

5.2 COURTS ARE A NECESSARY PART OF SOCIETY

Before any reform of the justice system is possible, it is important to remember the purpose for which courts are designed. Courts grew out of the necessity for society to provide a way of resolving disputes which did not threaten the fabric of society. The courts continue to exist because, despite their problems, the people have confidence in the integrity and wisdom of the courts, and they continue, in times of stress, to turn to the courts for the vindication of their rights.

The courts protect the rights, liberties and freedoms of citizens. The courts do not function in a vacuum; they are an essential part of the government of our society. Society cannot exist without laws, and where there are laws there must also be a method of fairly and justly administering these laws. The justice system is an integral part of the process of governing. It is, as Peter Russell states, the third branch of government. Emmett Hall, in his 1974 Report of the Survey of the Court Structure in Saskatchewan, described the function of the courts as follows:

> The courts of law occupy the pivotal point in the scales of justice. They apply the concept of the 'rule of law' rather than the 'rule of men' to the controversies

> which men and women cannot otherwise settle peacefully. They represent the substitution of the authoritative power of reason, knowledge, wisdom and experience to the settlement of conflicts between citizens and between the state and its citizens. [at 4]

In an earlier era, much of the law administered by the courts was customary law - common law and equity. In modern times, however, statute law has become a much greater source of the law administered by the courts. The Canadian Charter of Rights and Freedoms, the new family law regime, the Young Offenders Act are all examples of legislation which have added greatly to the work of the courts.

However, the courts are hampered in their efforts to implement legislation if the government does not consider the impact of legislation on the courts before passing it. If the government refuses to provide the courts with the resources to carry out legislative reforms, the benefit of those reforms is severely curtailed. **It should be a general principle of government to assess the cost of implementing legislation which will affect the courts as part of the cost of the legislation itself.** If the government cannot afford the cost of implementing the legislation, it cannot afford to pass the legislation.

It also follows that if courts are a necessary part of society, then they must be funded properly. Currently, the courts' important position in society is not reflected in the level of funding which they receive. **It is the recommendation of this Inquiry that the courts should be properly funded.**

5.3 COURTS ARE A SOCIAL SERVICE

Courts exist to serve the public. Lawyers, judges, court registrars and court clerks all serve the justice system, which in turn serves the public. Arthur T.

Vanderbilt organized one of the most successful court reforms in the United States when he took on the task of restructuring the New Jersey court system. It was his contention that,

> ... no set of recommendations, however wise, will avail unless both judges and lawyers constantly remember that the courts exist not for judges and lawyers but for the benefit of litigants and of the public. They must constantly bear in mind what have been termed the fundamental rights of litigants. Every litigant is entitled (1) to a prompt and efficient trial of his case, ... (2) at a reasonable cost; (3) represented by competent attorneys; (4) before impartial and trained judges and honest and intelligent jurors; (5) with the privilege of a review of the trial Court's determination by an appellate tribunal composed of similar judges... [at 703]

It is the opinion of this Inquiry that the principle that courts exist for the benefit of litigants and the public is one which must be kept in mind whenever reform or restructuring of the courts is under consideration. The courts are like all institutions, they tend to take on a life of their own. The impetus for change generally comes from within, and the objectives of the changes are usually to improve the lives of the people who are inside the institution. Mr. Justice Riddell understood this tendency when he stated,

> ... Courts were not made and are not sustained by the people for the sake of counsel, but counsel exist for the assistance of the Courts in determining the rights of the people. Kendrick v. Barkey (1907), 9 O.W.R. 361 (Ont. H.C., Riddell J.)

This Inquiry would go a step further and state emphatically that not only counsel should be cast in a social service role, but that the entire court system has a purpose only to the extent that it serves the community. While it is desirable that judges and other people working in the system should be well treated so as to maintain their morale and dedication, the comfort of those working in the courts is not the primary goal of the reform of the court system.

5.4 COURTS MUST BE ACCESSIBLE TO THE PUBLIC

If the general public are the people for whom the courts are designed, then the principles governing the structure of the courts should take their needs into account. The general public are not concerned with the prestige of any given court, they merely want to understand the system, to have access to the system, and to have their problems dealt with properly, efficiently and quickly. To this end, the structure of the courts should be simple, accessible and efficient.

Accessibility takes a number of different forms. They are,

- physical and geographic accessibility
- intellectual accessibility
- economic accessibility
- timeliness

5.5 PHYSICAL AND GEOGRAPHIC ACCESSIBILITY

Physical accessibility refers largely to the need to provide access to those people who are physically disabled. The government of Ontario has a policy of making all its public buildings accessible to the physically disabled and a large number of the older courthouses have had ramps built so that wheelchairs can get into the buildings. **When new buildings are required, both the courthouse and the courtrooms should be designed with handicapped parties,**

witnesses, lawyers, judges and spectators in mind.

Geographic accessibility refers to the location of the courts. In some towns the courts have become scattered throughout the town. In some cases the court offices are separated from the court itself. Not only is this inefficient, but it is also unduly confusing to the public. All courts and court offices should be in one location wherever possible. If this is not entirely possible, then at a very minimum, a court and its office should be in the same location. In the very large centres, like Toronto, it makes sense to decentralize the courts. However, even these "branch offices" should be designed so as to include all types of courts under one roof.

It is the recommendation of this Inquiry that all courts and court offices should be housed in a single building.

The smaller centres in Ontario should have local access to the Provincial Courts, even though the courts may not function on a full time basis. These are the courts with which the public has the most contact and no person should have to travel long distances in order to attend these courts.

Geographic accessibility takes on a particular importance in northern Ontario. Although it will probably never be economically efficient to take the courts into the remote areas, it is important that this continue to be done. The presence of the courts in remote regions is a reminder that all residents of Ontario are subject to the same law, and that the government expects its residents to bring their legal problems to the court and that it will keep the cost of litigation low by bringing the courts to the people rather than requiring the people to go to the courts.

It is the recommendation of this Inquiry that there should be Provincial Courts in the smaller centres and that the Provincial Courts should provide service to the remote centres of Ontario.

5.6 INTELLECTUAL ACCESSIBILITY

Intellectual accessibility refers to the structure of the court and, to a degree, the procedures of the court. The court structure should be sufficiently simple that the public can understand the hierarchy and the functional distinctions between the different courts. Further, the jurisdiction of each court should be reasonably well delineated. It should be possible for the public to understand in general terms in which court a particular type of case should be brought. This is not an academic notion - a person who seeks the help of the courts should have some understanding of the jurisdiction of the various courts.

The names which are given to the courts should bear some relationship to the function of the court and its place in the hierarchy. At the present time, we have courts whose names have some legal historical connotations, but not much rationality. The name "Divisional Court" gives no hint as to its function. The name "Supreme Court of Ontario" refers to both the High Court of Justice and the Court of Appeal, causing constant confusion, particularly among the media, who have to report to the public on these courts. The title "Supreme Court of Ontario" also fails to make it clear that the Court of Appeal is a higher court than the High Court of Justice.

In order to help the public understand the courts, it is recommended that information pamphlets, signs, and court personnel should be provided to help the public find their way around the courts. This information is very important in the Provincial Court system, where the public most often find themselves and where they often represent themselves.

It is also in these courts that the procedures must be kept simple so that unrepresented litigants feel that they can do an adequate job of presenting their case, and that they have a reasonable chance of success. If the procedures become too complex, litigants will feel inhibited and intellectual accessibility will be lost.

When procedures become complex, not only is intellectual accessibility lost, but also the speed with which cases are decided and the inexpensive nature of the litigation. Where there are lawyers and judges, there is also a tendency to complicate matters in an effort to make them better. In the Provincial Court this tendency must be resisted at all costs.

5.7 ECONOMIC ACCESSIBILITY

Economic accessibility is possibly the most important type of access to the courts. In recent years, economic access to the courts has in large part become the preserve of the very poor, who can apply for legal aid, and the rich, who can pay their own way. The middle class are sometimes required to absorb losses that they could have recovered in court, except for the fact that the cost was prohibitive.

It is therefore recommended that the court system should be made economically accessible to people of all income levels. In order to provide such a service, an affordable court will have to be a court with simple procedures so that people can represent themselves, and have sufficient jurisdiction so that most cases can be dealt with there.

5.8 TIMELINESS

One of the principal complaints respecting the justice system is its slow pace, and in general terms, this criticism is deserved.

In civil cases, the pace of litigation is largely controlled by the parties themselves. However, the system must provide procedures and mechanisms whereby the cases can be processed (within reason) as fast as the parties wish.

In criminal cases, the issue is more difficult. **It is recommended that the speed with which criminal cases are tried should be recognized as important, not only to the immediate parties, but also to the public at large.** Section 11(b) of the Canadian Charter of Rights and Freedoms guarantees to all accused a right to trial within a reasonable time. It is therefore mandatory that the justice system provide sufficient resources so that this may be accomplished. Failure to provide a trial within a reasonable time can result in a dismissal of the charge.

It is, however, the observation of this Inquiry that those accused of crime and their counsel are often disinterested in trial within a reasonable time. Delay is perceived not as a factor which will impair the ability of the accused to present a defence but rather a factor which will erode the case for the prosecution. It is therefore most often the defence which seeks delay. Courts should no more tolerate delay by the accused than by the prosecution.

The delay factor is exacerbated in a number of Ontario communities where criminal defence work is done by a small number of lawyers. As a result of heavy caseloads, defence counsel are booked well into the future and are unable to accept early trial dates. In effect, case scheduling tends to become an award of dates to the court by defence counsel.

It is the recommendation of this Inquiry that if counsel is unable to accept a trial date within a reasonable time because of conflicts in his or her own schedule, he or she must arrange for substitute counsel or withdraw from the case entirely. It may be argued that it is the accused alone who has a right to trial within a reasonable time and that he or she can waive this right. It is, however, a corollary to the right of the accused to trial within a reasonable time, that society as well possesses this right in criminal cases, and this right cannot be overridden by the calendar difficulties of defence counsel.

The Charter guarantees to each accused the right to counsel but this is not a particular counsel - only a counsel who is available to conduct the case within a reasonable time. This is not to suggest that courts should be machine-like in the award of dates. To the extent possible, the schedules of busy defence lawyers and witnesses should be accommodated, but this accommodation has its limit and that limit is trial within a reasonable time.

5.9 COURTS MUST ATTRACT THE BEST PEOPLE

Courts operate best when they are staffed by experienced people. People only become experienced, however, when they have worked in the system for a number of years. It is therefore a false economy to allow experienced people to leave the system, either because the system is so designed that they cannot expect any substantial advancement or because salary levels are too low. The justice system presently suffers from both these problems.

An effort should be made to seek out and appoint good people, and the search should start among those who already have some experience and have demonstrated ability. This statement is as true for judges as it is for court administrators, registrars and sheriffs. Once good people have been chosen, it is not enough to put them in the job and then abandon them. **It is recommended that a period of training should be offered, particularly if the person appointed is to fill a significant post.** In the case of judges, training is particularly important, since any problems arising through inexperience can substantially affect the lives of others.

5.10 COURTS MUST BE AS EFFICIENT AS POSSIBLE

The goal of the justice system is to do justice, and no reform which would impede this goal would be acceptable. In order to reach the goal of delivering justice, the system must necessarily contain some inefficiencies. Witnesses do become ill or are unavailable at the last minute and a case may therefore be delayed. The length of the trial cannot be predicted with perfect accuracy and a degree of standing and waiting will be inevitable. A certain degree of inefficiency even in the business world is inevitable. However, even allowing for some lack of efficiency, any reform of the administration must lead to its being, and appearing to be, as industrious and hard working as possible.

The court system cannot be efficient if it is unable to plan ahead. Being able to anticipate situations and to prepare to meet them is a quality that the courts at present do not have. Instead, they appear to be in a perpetual state of crisis. Judicial appointments provide an example of this type of crisis administration. Despite the fact that retirement dates are known well in advance, governments always appear surprised when a judge retires. There are frequently considerable delays between the retirement of the previous judge and the appointment of his or her successor. This gap disrupts the system, contributes to delay and backlog, and is utterly unnecessary. An effective management system would anticipate the need for a new judge and would ensure that an appointment was made in time for a smooth transition.

Despite the fact that there must be inefficiencies in the court system, it is the recommendation of this Inquiry that constant inefficiencies should not be accepted as the hallmark of the justice system.

5.11 CONCLUSION

The statement that everyone is entitled to his or her day in court means very little if litigation is prohibitively expensive, or if it is impossible to comprehend where a case must be tried or why it is tried in one court as opposed to another. A court system is not a benefit if a person cannot get to the court, or if the case takes so long to be heard that the result has become meaningless. Both the structure and the management of the court system must work in concert to produce an efficient, simple, timely and affordable system of justice.

CHAPTER 6

The Structure of the Courts

6.1 INTRODUCTION

As outlined in Chapter 3, the trial courts in Ontario are organized in a three-tiered hierarchy. The system could be described as a four-tiered hierarchy if one regarded the Provincial Offences Courts as a separate tier. For present purposes, however, the Provincial Offences Court will be regarded as a part of the Provincial Court (Criminal Division).

Over a long period of time, the distinction between the three tiers has become blurred. This process appears to have occurred for three interrelated reasons. First, the sheer volume of cases has created pressure to shift cases out of the High Court. Secondly, the very size of this province and the infrequency with which High Court sittings were conducted also required that more cases be moved to courts where the matters could be handled more expeditiously. Thirdly, and importantly, the nature of the courts other than the High Court of Justice has changed.

Beginning in the 1960's, as a result of the McRuer Report, the Provincial Courts have undergone a substantial change. In Ontario, Magistrates Courts, Family Courts and Small Claims Courts became the Provincial Court. The appointment of non-lawyers to the Provincial Court bench was discontinued. This process is described by Professor Russell as the judicialization of the magistracy. The result of this process has been a substantial improvement in the status of the Provincial Court and an improvement in the calibre of the judges who preside in it.

In the case of the County and District Courts, policies initiated in the 1960's by John Turner and Otto Lang during their respective tenures as Ministers of Justice have substantially improved the quality of judges presiding in those courts. The increasing demands on the Provincial Court and the County and District Courts have led to an improvement in those who preside and, in turn, the increasing competence of those courts has led to still further transfers of jurisdiction. These two factors have operated reciprocally to enlarge the status, importance and competence of the so-called "inferior courts".

The process has continued to a point where there is now considerable overlapping in jurisdiction and, at least in the minds of the public, a considerable confusion as to the position of the various courts in this province. This duplication of function, coupled with the wasteful stratification, leads one to ask whether or not the present complex system is necessary. It is the opinion of this Inquiry that the criticisms and complaints (see Chapter 4) with respect to the structure of the courts in Ontario are generally well founded and that the structure should be reorganized.

6.2 PROPOSALS FOR CHANGE

Perhaps the most modest proposal made is that the present hierarchy of trial courts should be retained, but that the jurisdictional boundaries between them should be adjusted. This proposal would accomplish very little and would simply continue the complexities and waste of resources that now exist. The overwhelming majority of those associated with the justice system in this province are of the opinion that substantial change is necessary.

A more radical proposal is that the courts should be organized by function. The essence of this proposal is that there should be three courts in Ontario: a civil court, a family court and a criminal court. Each of these three specialized courts would handle all of the cases within its specialty, irrespective of size, complexity or manner of trial. Perhaps the leading advocates of this type of structure are the judges of the Provincial Court (Criminal Division) who advocate a unified criminal court and concede that their plan for a unified criminal court necessarily implies the same functional division for family and civil matters.

It is said that such a plan would bring the specialist judge to the case and that efficiency would improve. It is also said that, at least in the criminal courts, judge shopping would be eliminated since one could not elect trial in another court. An accused, of course, would continue to enjoy the right to trial by jury, but the jury trial would take place within the unified criminal court.

6.3 ARGUMENTS AGAINST STRUCTURAL DIVISION AL&ONG FUNCTIONAL LINES

This proposal of three courts organized along functional lines enjoys very little support. Apart from the lack of support for this proposal, there are a number of reasons why this plan, with the exception of a unified family court, should be rejected.

It is not apparent that this plan contains any substantial benefit to the public in terms of accessibility or efficiency. The unified criminal court would result in a substantial improvement in the lot of those who preside in the present Provincial Court (Criminal Division) but this factor cannot be a sufficient reason to reorganize the court system.

The division of the courts by class of cases would mix the short and simple cases with the long and complicated. Inevitably, these specialist courts would have to establish a division to handle short, high-volume cases and a separate division for slow-moving, more complex cases and jury trials. Thus, in fairly short order, the basic three courts would multiply by the creation of internal divisions and soon the three would become six and the resulting system could be more complex than the system we now have.

This proposal also does not recognize the realities of Canadian federalism. The question arises as to who will appoint the judges of these unified courts. The proposal that the judges be appointed jointly by both the province and the federal government is not workable. The federal government cannot abdicate its power under s. 96 of the Constitution Act, 1867 and confer total power of appointment on the Province of Ontario (see McEvoy v. Attorney General for New Brunswick, et al., [1983], 1 S.C.R. 704). It is the proposal of those who advocate this kind of system that the constitutional problem be avoided by simply having the federal government appoint all of the judges to these three courts. This presupposes that the province would voluntarily abdicate its power to appoint judges outside of s. 96. This is highly unlikely.

It will be proposed later that some minor adjustments be made to the division of power to appoint judges, but the radical changes involved in the three unified courts proposal fall outside the ambit of realistic expectation of success.

Finally, this proposal would eliminate the concept of the superior court and thus there would be no court with any supervisory power through extraordinary process over the other courts.

The Provincial Court presently handles a very large number of cases and is geared to simple procedures and high volume. Expanding this court into a court of general jurisdiction, which would include accepting the longer and more complex cases and the necessity to provide jury trials, would run the risk of impairing the efficiency that now exists in the Provincial Court system without the assurance of any substantial benefit resulting from a change.

6.4 PROPOSED STRUCTURE OF THE ONTARIO COURTS

It is the recommendation of this Inquiry that the ne;s of the people of Ontario will be best served by a two level court system consisting of a superior court of general jurisdiction, with judges appointed by federal authority, and a local court system of special or limited jurisdiction, with judges appointed by provincial authority.

The superior court will discharge the traditional functions of a superior court. Like the present High Court, this court would enjoy province-wide jurisdiction and would be an itinerant court but would be organized on a regional basis. It would, of course, deal with the more complex cases and would function either with or without a jury. The volume of cases would be comparatively low but, as past experience indicates, the length of the cases themselves would be relatively long. Regrettably, it follows that in such a court the cost to the litigants would be higher than those in the local courts.

The local court of limited jurisdiction, like the present Provincial Court system, would be geared to handle a very high volume of cases with maximum despatch and minimum cost. It is not to be inferred that this court would handle only unimportant cases, although many so-called unimportant cases, such as traffic cases, will be handled by the local courts.

Factors other than the size or so-called importance of the case may require that a matter be dealt with by local courts. The need for speedy resolution, a lack of formality or minimum cost will all be factors in determining the jurisdiction of local courts.

The concept of a two level court system is far from new. The basic concept was advanced by Roscoe Pound in 1909 and was the basis of a highly successful reorganization of the New Jersey court system by Arthur Vanderbilt. The Vanderbilt reorganization set the standard for many subsequent state court reforms in the United States.

In Canada, Quebec has always had basically a two level court system. Most of the other provinces which have had a structure similar to that in existence in Ontario have moved to a two level system.

It is not to be ignored as well that the proposed two level system accommodates Canadian federalism by providing for both provincial and federal participation in the appointment of judges to the courts in Ontario.

In Ontario, we do not begin the process of designing a court structure with a clean slate. There are already a number of courts in existence, and the adaptation of the existing courts into a two level system and the determination of which matters should be tried in the local courts poses difficult problems.

6.5 MERGER OF THE HIGH COURT AND THE DISTRICT COURT

Before going further, it would be appropriate to address the issue of merger between the High Court of Justice and the Ontario District Court. It is proposed by the members of the District Court, and by others as well, that the easiest way to convert the present system into a two level system is to merge the District Court and the High Court of Justice. This is a solution which has been adopted in Alberta, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island and Newfoundland. It is obvious that this is a simple and easily-achieved solution since the judges of both courts are appointed by federal authority, pursuant to s. 96, and no constitutional problem arises. It is, however, the view of this Inquiry that simple merger is not an appropriate solution in Ontario.

Merger would obviously produce a very large court - approximately 200 judges. This fact, by itself, is not a significant argument against merger. The more serious problem, however, is that the merged court would have a very extensive jurisdiction. One of the principal complaints against the justice system is its cost. There are many matters now within District Court jurisdiction for which the cost of proceeding in that court is a substantial barrier in the way of accessibility to justice. Sweeping the whole of District Court jurisdiction into a superior court structure would, in a large number of cases, increase the cost to the litigant and make justice even less accessible. In addition, since the superior court would not sit permanently or even frequently in the small centres in this province, it is difficult to see how merging the District Court and the superior court system would enhance geographical accessibility.

There are additional factors which militate against simple merger. A superior court system would be, to a degree, a travelling court. Most members of the District Court accepted appointments to that court on the basis that they would perform their duties in one community. It is far from clear that all the members of the District Court are prepared to accept the burden of membership in an itinerant court. It must be said as well that not all of the appointees to the District Court have demonstrated the level of competence to be expected from a member of a superior court. It is the opinion of this Inquiry that allocating jurisdiction between local courts of limited or special jurisdiction and a superior court of general jurisdiction is a more complex task than is reflected by the advocacy of simple merger of the two s. 96 courts.

6.6 THE LOCAL COURTS OF SPECIAL OR LIMITED JURISDICTION

In addressing the problem of redesigning the Ontario court system, it is appropriate that one begin with the foundation. Too often, those who have written or spoken on the subject, or even made submissions to this Inquiry, are overly concerned with the so-called top of the judicial structure. The contact with, and the perception of, the judicial system by the overwhelming majority of the people of this province is with the Provincial Court system. In the fiscal year 1985-86, more than 3,000,000 cases were processed through the Provincial Court system. This number is to be contrasted with approximately 130,000 in the District Court, and just under 10,000 for the Supreme Court.

The judicial system in this province touches the lives of most of the people in relatively ordinary and undramatic ways. While the superior court handles very important cases, only a relatively small number of people are directly involved.

In this province, there are two courts which can be described as local courts, the Provincial Court and the District Court. It is, however, the Provincial Court system which handles by far the largest number of cases and touches the lives of the greatest number of people. The District Court, which is also a local court, handles far fewer cases. Its procedures are more complicated and more costly. In short, the procedure in the District Court is identical to that of the High Court. It is proposed that an expanded and reorganized Provincial Court should be the only local court and that those matters dealt with in the District Court that need to be handled in a quicker, simpler and more affordable way should be transferred to the Provincial Court.

Some of the proposed changes can be accomplished fairly easily by either the federal or the provincial government. Others, unfortunately, will require a constitutional amendment.

Before dealing with the detail of the changes in jurisdiction, it is desirable to address the overall structure. The Provincial Court in Ontario is divided into divisions: criminal, family and civil. Each division has a chief judge and two of the divisions (family and criminal) have an associate chief judge. Despite the fact that judges of the Provincial Court are appointed simply as judges of the Provincial Court, judges assigned to one division almost never sit in another division. The judges of the three divisions are separated into three almost watertight compartments.

The matter is further complicated by the fact that the function of youth court under the Young Offenders Act is assigned to the Provincial Court. In the Ontario provincial court system, the youth court function is split in two. The younger offenders are handled by the Family Division and the 16 and 17 year olds are dealt with by the Criminal Division.

The present organization of the Provincial Court is wasteful and inefficient. Judges in one division sit idle while those of another division are overburdened. In thinly populated areas, extensive travelling is duplicated by judges in different divisions. In some areas of the province, even the courtrooms tend to be regarded as the property of a particular division of the Provincial Court and are not freely available to other divisions. The existing organization prevents the efficient and businesslike utilization of judges, administrative personnel and physical resources. **It is the recommendation of this Inquiry that the Provincial Court should be reorganized as a single court with criminal, civil and family jurisdiction and that it function also as a youth court. To this end, there need be only a single chief judge of the Provincial Court. It is further recommended that there be seven**

associate chief judges of the Provincial Court - one for each region in the province. For a detailed explanation of the regional management of the courts, see Chapter 7.

Some of the holders of the present offices of chief and associate chief judge of the various divisions may be appointed to these new positions. Others may wish to simply perform the duties of judge within the reorganized court. Those who continue as judges should nevertheless be allowed to retain the title of their former office and to receive the salary differential attached to that office. When the offices of chief judge and associate chief judge of the various divisions fall vacant, they should, of course, be abolished.

It is of course recognized that, for reasons of efficiency, the Provincial Court will continue to have functional divisions: criminal, civil, family and youth court, but these functions should be organized in a businesslike way and should not be the subject of jurisdictional compartmentalization. For example, in small communities, there is no reason why a single judge cannot exercise all of the functions of the Provincial Court. Conversely, in a large community where case volumes are high, judges should be allowed to specialize as their talents and inclinations dictate. No doubt appointments will be made with the expectation of specialization. But the fact of functional specialization should not be allowed to prevent the businesslike allocation of personnel. Judges must be susceptible to assignment as the business of the courts demands.

There are other benefits that will flow from this kind of mobility. Judges who move from division to division will be able to see the legal problems of one division in the context of the whole justice system rather than as just another case in a specialized court. Mobility between divisions can introduce a degree of variety into the judges' workload and thereby prevent the judiciary from being overcome by boredom or becoming susceptible to burnout. With a unified system, the ability of the court to provide French language trials will be improved since in some communities there are bilingual judges sitting in one division but not another.

In short, the type of mobility outlined above will improve the efficiency of the court and enlarge the competence of the judges. It should be observed, as well, that there is a feeling among many Provincial Court judges in this province that their particular court lacks status and definition within the judicial hierarchy. It is the view of this Inquiry that the proposed reorganization will enhance the position and status of the Provincial Court within this province.

It is necessary now to deal with the specifics of the jurisdiction of the proposed Provincial Court.

6.7 CIVIL JURISDICTION

Currently, the civil jurisdiction of the Provincial Court is limited to cases under $3,000 in Metropolitan Toronto and $1,000 in the rest of the province. This difference in jurisdiction is justified on the basis that the Toronto Provincial Court (Civil Division) is a pilot project, but the time has now arrived to end the pilot project and make the jurisdiction of the Provincial Court uniform throughout the province. It is beyond argument that the civil jurisdiction of the Provincial Court should be substantially increased; and simply increasing the jurisdiction in the rest of the province to $3,000 to match the Toronto jurisdiction would not be sufficient.

In the 1960's, the jurisdiction of the Division Court, a forerunner of the Provincial Court (Civil Division), was $400 in southern Ontario and $800 in northern

Ontario. Adjusting the amount of $800 or $400 for inflation, the jurisdiction of that court was substantially higher than the present jurisdiction. Further, the increasing costs of litigation are making it extremely difficult for people to litigate claims of moderate size. It appears that claims of modest size (between $5,000 and $10,000) when taken to judgment in the District Court can involve legal fees of approximately $5,000. It is therefore clear that in cases of this size, the prohibitive cost denies access to justice in the civil courts. **It is the recommendation of this Inquiry that the civil jurisdiction of the Provincial Court be increased to $10,000 throughout the province.**

In the event that there is any substantial delay in the implementation of this recommendation, the declining value of the dollar should be recognized and the power to increase the monetary jurisdiction of this court, by regulation or by automatic indexing, should be built into the legislation. The increase to $10,000 would appear to be well within the constitutional power of the province and can be accomplished by simple amendment to the Courts of Justice Act.

This Inquiry has received a number of submissions that, in addition to an enlarged statutory jurisdiction, the Provincial Court should be given consent jurisdiction to hear matters beyond the statutory monetary jurisdiction.

We have been told that in at least one jurisdiction in this province, very large claims are presently being tried on a consent basis in the Provincial Court (Civil Division) and that the process works very well. We can see no objection to an enlarged consent jurisdiction and, for those who wish a quick, economical and informal resolution of the dispute, this proposal contains substantial benefit.

It is therefore recommended that, on the consent of

the parties, a matter beyond the monetary civil jurisdiction of the Provincial Court may be heard in that court.

The mechanism to accommodate this consent jurisdiction should be similar to the mechanism respecting consent jurisdiction now in place in the District Court. A claimant may initiate a claim in Provincial Court beyond its monetary limits and, failing consent by the other party, the claim would be transmitted to the Superior Court. If consent is forthcoming, the matter would be tried in the Provincial Court.

6.8 LANDLORD AND TENANT MATTERS

It is also desirable that landlord and tenant cases, which now must be heard in the District Court, should also be resolved in a less formal setting. The overwhelming majority of landlord and tenant cases involve residential tenancies and these disputes should be resolved as quickly and economically as possible.

There is, however, a constitutional problem standing in the way of assigning full jurisdiction in landlord and tenant matters to a provincial court. In Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714, the Supreme Court of Canada held that the Province of Ontario could not assign power to make orders evicting tenants or the power to require landlords to comply with obligations imposed by the Residential Tenancies Act to a Residential Tenancy Commission. The court held that those powers could be exercised only by a s. 96 court.

This Inquiry has been advised by counsel that if residential tenancy cases in which the annual rent was within the monetary limit of the Provincial Court ($10,000) were assigned to the Provincial Court, there is a reasonable likelihood that this assignment of power would survive constitutional scrutiny. This, however, would have the effect of dividing landlord and tenant cases between two courts and is therefore not a solution that this Inquiry recommends. **This Inquiry recommends that the province seek an amendment to s. 96 of the Constitution Act permitting the province to appoint judges to hear landlord and tenant cases.**

This should not be a startling proposal. In A.G. Quebec v. Grondin, [1983] 2 S.C.R. 364, the Supreme Court of Canada held that the Province of Quebec could assign landlord and tenant cases to a provincial board without contravening s. 96 of the Constitution Act. The distinction between this case and the Residential Tenancies case is that prior to 1867, jurisdiction in landlord and tenant matters in Quebec was not exercised exclusively by s. 96 courts but was divided between superior and inferior courts. An amendment to s. 96 would simply straighten out this constitutional peculiarity and make provincial power in this area the same for all provinces.

6.9 JUDGES OF THE CIVIL DIVISION

At present, there are different kinds of judges who preside in the Provincial Court (Civil Division). In Toronto, Hamilton, St. Catharines and Ottawa, full time Provincial Court judges preside. In parts of the rest of the province, District Court judges preside. In still other areas of the province, deputy judges preside in these courts.

It is desirable that ultimately all of the civil work in the Provincial Court be handled by Provincial Court judges. It is therefore recommended that additional Provincial Court judges should be appointed throughout Ontario to handle civil matters. There will, however, be a period of transition and, during this time, it is recommended that District Court judges should continue to be empowered to sit in the Provincial Court to hear civil cases

in the same manner as they are now doing and have done for many years.

It is further recommended that the use of deputy judges should be continued for a transitional period, but with some modifications. In some centres, deputy judges are selected monthly from a very large panel of practising lawyers. This practice has not been a success, and has resulted in a high degree of confusion, unpredictability and an erratic level of competence. In other areas (e.g. Waterloo), one or two senior practitioners have accepted the post of deputy judge for extended periods of time. This system has worked well by virtue of the long-term commitments and the experience thereby gained. This type of deputy judge has performed very satisfactorily.

It is recommended that only a small number of deputy judges should be used in each court until the transformation of the Provincial Court is complete.

It is essential that civil matters in the Provincial Court be handled as simply and as economically as possible. The increased civil jurisdiction should not be accompanied by a movement towards a more elaborate procedure which would include motions and discoveries. It is to be observed that recently the judges of the Provincial Court (Civil Division) have been wearing judicial robes. Previously, judges who presided in the Small Claims Courts and the Division Court wore business suits. If the donning of robes simply enhances the dignity of the proceedings, there can be no objection to it. This development, however, should not be regarded as the beginning of a trend towards increased formalism, and any such trend should be stopped in its tracks.

This Inquiry is also concerned that accessibility to the Provincial Court in the exercise of its civil jurisdiction should not be diminished because of fear of an award of costs on a scale that in any way parallels the costs scale in the District or High Court. It is the view of this Inquiry that, in civil cases in the Provincial Court, any award of costs should be confined to court-related expenses and should not extend to indemnification for lawyers' fees.

The hallmarks of the Provincial Court in the exercise of its civil jurisdiction should be accessibility, speed, low cost and simplicity. It should be within the capacity of anyone to handle his or her own civil case in the Provincial Court. Toward these ends, it is **recommended that the Provincial Court, in the exercise of its civil jurisdiction, sit in both the large and small communities in Ontario and not be centralized in only the the county or district town. The details with respect to the number and places of sittings should be determined by the regional Courts Management Committee. The printed form "fill in the blanks" type of pleadings now used in the Provincial Court should be continued to be used even though the monetary jurisdiction has been increased. Any award of costs in the Provincial Court should be confined to out of pocket expenses for the costs of filing and serving claims, witness fees and the like.**

6.10 CRIMINAL JURISDICTION

In general terms, the Provincial Court possesses adequate jurisdiction to deal with all the criminal matters that should be consigned to a local court. Exercising this jurisdiction, Provincial Courts hear 96% of all criminal cases. There is, however, one anomaly that should be addressed: Part XVI of the Criminal Code provides that an accused charged with most indictable offences may elect trial before a judge alone. This procedure was once referred to as electing speedy trial. In Ontario, this election results in the accused being tried by a judge of the District Court. In the Province of Quebec, this type of election leads to a trial before a Provincial Court judge or a judge of the Sessions of the Peace (both are provincial courts).

It is the recommendation of this Inquiry that the criminal jurisdiction of the Ontario Provincial Court be enlarged to correspond with the Provincial Court of Quebec so that the majority of all judge alone trials can be heard in the Provincial Court.

There are two good reasons why this should be done. First, the procedure in itself is a reflection of an era now long past when most of the provincial magistracy was not legally trained. Trial by a competent judge can now be furnished much more simply and quickly in the Provincial Court system. Second, this election no longer ordinarily results in a speedy trial, but rather the election is frequently a refuge for those who seek delay.

6.11 YOUTH COURT

The Provincial Court (Criminal Division) and (Family Division) is designated as a youth court pursuant to the Young Offenders Act. When the Young Offenders Act replaced the Juvenile Delinquents Act, the age of the young offender was raised from under 16 to under 18. For reasons which are not important here, those under 16 are dealt with by the Family Division and those aged 16 and 17 are dealt with in the Criminal Division of the Provincial Court. This division of the young offender cases produces a lack of uniformity in dealing with young offenders and has given rise to a degree of confusion and complaint. This method of dividing youth court jurisdiction will, of course, disappear with the reorganization of the Provincial Court. **It is recommended that the whole Provincial Court should be designated a youth court, and any judge of that court should be empowered to hear cases pursuant to the Young Offenders Act.** In large centres, a judge may wish to, or be asked to, specialize in this type of case. In smaller centres, youth court cases will simply be a part of the judge's caseload, but in no case will it be necessary to divide the youth court cases into two groups as is now done.

6.12 PROVINCIAL OFFENCES COURT

As outlined in Chapter 2, in 1979, the Provincial Offences Act was passed and the Provincial Courts Act was amended to provide for a Provincial Offences Court. Provincial Court judges and justices of the peace are both authorized to preside in this court.

In practice, it is the justices of the peace who usually preside in this court. Approximately 85% of the cases in this court are Highway Traffic Act and Liquor Licence Act matters. The issues are relatively simple and the penalties are modest. There are, however, some very serious and difficult cases that can, and do, go to the Provincial Offences Court. Cases under the Environmental Protection Act and the Securities Act can present difficult issues and result in very large penalties. This Inquiry has received a number of submissions that these more serious cases should be tried by a judicial officer with legal training. Apparently, there have been instances where provincial judges have declined to hear serious cases in the Provincial Offences Court. It is the opinion of this Inquiry that these submissions are well founded. **It is therefore recommended that serious and difficult cases in the Provincial Offences Court be tried by Provincial Court judges.**

No new legislation is necessary to give effect to this recommendation. The work of the Provincial Offences Court should be monitored and the Associate Chief Judge of the Provincial Court for the region should assign a Provincial Court judge to hear the difficult and serious cases.

6.13 JUSTICES OF THE PEACE

In 1981, Professor Mewett prepared a comprehensive report dealing with the office of justice of the peace and made a number of recommendations designed to improve that office. There would be little point in another review of the subject.

In 1984, the Justice of the Peace Act was amended to reflect some of the changes recommended by Professor Mewett. However, the majority of his recommendations were not addressed at that time. There is presently before the legislature an Act to revise the Justice of the Peace Act which will, in general terms, implement most of the Mewett recommendations, particularly with respect to the appointment, remuneration and supervision of the justices of the peace. The Mewett Report and the proposed legislation make it unnecessary for this Inquiry to make any recommendations, save one. This arises from the recommendation of this Inquiry with respect to the regional structure of the courts. The proposed legislation provides for the appointment of a provincial court judge as coordinator of the justices of the peace. In the opinion of this Inquiry, this provision is not consistent with the regional approach to the administration of justice outlined in this report. **It is recommended that the Associate Chief Judge of the Provincial Court for each region act as the coordinator of the justices of the peace within that region.**

6.14 FAMILY LAW JURISDICTION

In Ontario, the jurisdiction in family law matters is spread among all three levels of trial courts. In general terms, the Provincial Court (Family Division) is empowered to deal with custody of children, support of children and spouses, crown wardship and the enforcement of support orders of other courts. The District Court has jurisdiction over custody, support of children and spouses and the division of family property. District Court judges, acting as local judges of the High Court, and the judges of the High Court have jurisdiction over custody, support, the division of property and divorce.

The deficiencies in this jurisdictional mosaic are obvious. Parties to a family dispute are sometimes involved in more than one court at the same time because each spouse may commence proceedings in a different court. Further, there are those who commence proceedings in the Provincial Court and find that only a partial resolution of their problems is possible and that they are obliged to go to a second court to resolve the property and divorce issues that remain outstanding. The Provincial Court (Family Division) finds that there are difficulties in enforcing the support orders of the District Court and High Court. In those cases where circumstances have changed, the Provincial Court is powerless to vary the order. Parties are obliged to return to the court that made the order to address the issue of variation and then return to the Provincial Court to deal with the issue of enforcement.

In 1974, the Law Reform Commission of Canada published a working paper entitled The Family Court, containing the following:

> The most distressing effect of the present state of affairs is the despair, confusion and frustration it [the legal system] causes to the participants... As far as the general public is concerned there appears to be no reason why all legal matters arising from a matrimonial or family dispute should not be dealt with by a single court. [at 7]

In the same year, the Ontario Law Reform Commission, in its Report on Family Law, Part V: Family Courts stated:

> The importance to the community of a specialized, efficient Family Court system with comprehensive jurisdiction in all matters pertaining to the family cannot be overestimated. In Ontario, the need for such a system has been growing for years. It has now reached urgent proportions. [at 1]

> Four different branches in the judicial hierarchy, the Supreme Court, the County Courts, the Surrogate Courts and the Provincial Courts (Family Division) administer family law in Ontario and this results in overlapping and competing jurisdiction, fragmented jurisdiction, and conflicts in philosophy and approach to the same problems among the different courts. The end result is inefficiency, ineffective treatment of family problems and unnecessary confusion. Only if a Family Court is given comprehensive jurisdiction in all family law matters, will it be capable of meeting the needs of the community. [at 3]

In addition to the matters pointed out above, there is another unfortunate aspect to the division of jurisdiction in family law matters. In his soon to be published book, The Third Branch of Government, Professor Russell outlines the history of the provincial family courts and then comments as follows:

> In the 19th century English magistrates had been given jurisdiction by a number of Acts designed to protect deserted wives and children. These same magistrates dealt with interspousal assaults and most criminal complaints involving children. There was a clear class-orientation to the Canadian family courts based on this English model. The clientele of the English and Canadian magistrate was mostly the poor. Complaints involving deserted or assaulted wives, truancy and juvenile delinquency almost always were directed against members of lower income families. The domestic relations disputes of the propertied classes - contested divorces, alimony, the custody of children - were kept in the higher trial courts. [at 374 of the manuscript]

This distinction between the courts continues. It is the observation of this Inquiry in visiting the courts of this province that the Provincial Court (Family Division) continues to be a court largely for the poor, while the "propertied classes" resort to the High Court and the District Court for the resolution of their domestic disputes. To address these problems, the Province of Ontario passed the Unified Family Court Act in 1977. That Act, on an experimental basis, set up a unified family court in Hamilton-Wentworth with exclusive jurisdiction to deal with all family law matters in place of the courts then exercising jurisdiction. This merger of the functions of the courts was accomplished by federal-provincial agreement. This pilot project was to last three years and then to be re-evaluated.

Three judges of the Provincial Court (Family Division) were selected to be the judges of this experimental court. To overcome the constitutional problems involved, the federal government appointed the three Provincial Court judges as District Court judges under the Judges Act. The need to confer an additional appointment upon the Provincial Court judges made the Unified Family Court something of a hybrid. Other than the need for this extra appointment, the Unified Family Court was essentially a magnification of the existing Provincial Court (Family Division) in Hamilton-Wentworth and in essence continues to be a part of the Provincial Court system.

The history of the Unified Family Court is now a matter of record. It is sufficient to say that it has worked well. A set of rules was developed providing for simplified procedures and for conciliation and mediation. Further, the court works closely with other social agencies of the province. In 1980, the court was the subject of a comprehensive evaluation and was continued. By virtue of the Unified Family Court Amendment Act of 1982, the court has become permanent in Hamilton-Wentworth but it has never been extended to other areas of the province.

In recent months, there have been some structural problems in the Hamilton-Wentworth Unified Family Court. These problems, however, have really little or nothing to do with the basic concept of the Unified Family Court. They result only from the hybrid nature of the court. It was unclear who should direct the judges of the unified court - the Chief Judge of the District Court of Ontario or the Chief Judge of the Provincial Court (Family Division). This issue has been resolved by provincial legislation providing for the appointment of a senior judge to direct the affairs of the Hamilton-Wentworth Unified Family Court.

6.15 EXPANSION OF UNIFIED FAMILY COURT

There are two issues that now arise: whether the Unified Family Court should be expanded to serve the rest of the province or be discontinued; secondly, if we are to have a unified family court, what kind of court should it be. With great respect for those who have filed submissions to the contrary, it appears that the case for a unified family court is overwhelming. It is an unfortrunate fact of modern life that marriage breakdowns have reached epidemic proportions. More than 40% of the marriages now being performed will fail, with resulting problems. It is essential that the justice system provide simple, economical and convenient methods of resolving these problems. In some of the choices this Inquiry must make, it must choose between competing theoretical proposals. However, with respect to family law, we have the benefit of a working model. The Unified Family Court of Hamilton-Wentworth is working well and has worked for the benefit of the people it serves for the past ten years. It is therefore apparent that the concept of the unified family court is not only good in theory; it is good in practice.

There is understandable resistance on the part of some members of the family law bar to the removal of family law matters from the High Court and they have proposed that, while there should be a unified family court, the High Court should retain concurrent jurisdiction in family law matters. They propose also that anyone who chooses to go to the superior court, and is prepared to bear the extra costs, should be free to do so. They would add that difficult cases should be transferred from the Unified Family Court to the High Court. In addressing the issue of what constituted difficult cases however, it became clear that difficulty would be largely a reflection of the value of the assets of the parties. It is the opinion of this Inquiry that this concept of concurrency should be rejected since it would continue the present dichotomy of one court for the poor and another court for the "propertied classes".

It is recommended that there should be a unified family court for the Province of Ontario.

The next and more troublesome question is, if we are to have a unified family court, what kind of court should it be, a s. 96 court or a provincial court? The answer to this question involves a constitutional issue.

6.16 UNIFIED FAMILY COURT AS A LOCAL COURT

There are a number of reasons why a unified family court should be a local court of specialized jurisdiction and a part of the provincial system. The Provincial Court system is traditionally a court of simple procedures and minimal cost. The creation of a s. 96 unified family court would inevitably carry with it the formalization and high cost traditionally associated with those courts. The unified family court can be built on the foundation of the existing Provincial Court system, which has a large number of experienced judges who are deployed throughout the whole of the province, serving not only the county towns but also the smaller centres.

A provincial unified family court would fit into the integrated provincial system already described and would be able to draw on a large panel of judges already in place throughout the province. Section 96 courts are available only in the county and district towns. It would be possible, of course, to create a new s. 96 court with a large number of judges to provide the service throughout the province, but this would be a wasteful duplication. A provincial court structure can be integrated more closely with the variety of other provincial social services that are required for the effective operation of a family court. These services include family counselling, child welfare and other similar agencies.

It is the recommendation of this Inquiry that a unified family court should be part of the Provincial Court system. This arrangement would make justice in family law matters more accessible (economically, geographically and intellectually) to the people of Ontario.

The submissions received by this Inquiry show that there will doubtless be a number of litigants and their counsel who will not find a provincial unified family court as hierarchically acceptable or as procedurally elaborate as they would wish, but these arguments cannot stand in the way of a better system for the overwhelming majority of the people of this province.

There is a significant problem in the way of awarding the Provincial Court the jurisdiction of a unified family court - s. 96 of the Constitution Act. It is clear that the province cannot confer full jurisdiction in family matters on its own judges and it appears likely that the federal government cannot confer full jurisdiction in family matters on provincial judges (see McEvoy v. Attorney General for New Brunswick, et al., [1983] 1 S.C.R. 704). It would therefore appear to be necessary that s. 96 be amended to permit the province to appoint judges with full jurisdiction to deal with family law matters. This is not a new or startling suggestion and has been considered on previous occasions by the federal and provincial authorities but without any resolution. It is apparent that a constitutional amendment is not something that can be accomplished either quickly or easily. It is, however, the opinion of this Inquiry that it is necessary, and it is the only way in which the people of Ontario can be provided with a court system to address the issue of family law disputes quickly and simply without financially crippling the parties.

It is therefore recommended that the province seek a constitutional amendment to permit the province to appoint judges with full power to deal with family law matters and that the power of a unified family court be conferred upon the Provincial Court.

Earlier in this report, we stated that the hallmark of the Provincial Court in the exercise of its civil jurisdiction should be accessibility, speed, low cost and simplicity. This same statement can be made respecting the family law jurisdiction of the Provincial Court. The use of printed "fill in the blanks" pleadings should be retained and interlocutory proceedings should be discouraged. Because of the importance of family law matters, it is likely that lawyers will play a far greater role in these cases than they will in the ordinary civil jurisdiction of the Provincial Court. It should, however, be possible for a person to handle his or her own family law case in the Provincial Court if that person so wishes.

There is one matter of detail respecting the Unified Family Court that must be dealt with. The judges presently serving in the Unified Family Court in Hamilton were appointed District Court judges by federal authorities. When the Unified Family Court jurisdiction is conferred upon the Provincial Court, some of the present Unified Family Court judges may not wish to become part of the provincial system. **It is therefore recommended that the judges of the Unified Family Court in Hamilton who do not wish to become part of the Provincial Court should be assigned to the District Court.**

6.17 SURROGATE COURT JURISDICTION

The Surrogate Court is a provincial court of record, presided over by judges appointed by provincial authority. In practice, the District Court judges are appointed as Surrogate Court judges. This court possesses jurisdiction and authority in testamentary probate and administration matters. The High Court has a certain concurrent jurisdiction with the Surrogate Court and contentious matters may be removed from the Surrogate Court to the High Court.

In fact, the Surrogate Court is largely an administrative agency. Surrogate Court trials are rare. The administrative offices of the Surrogate Court are simply additional titles conferred on District Court personnel. It is only in Toronto that there is a separate Surrogate Court registrar.

It cannot be said that the Surrogate Court is the source of any particular problem in the administration of justice but its continued existence is simply a needless complexity in the system. **It is therefore recommended that the Surrogate Court should be abolished and that the jurisdiction of the Surrogate Court be assigned to the Provincial Court.**

As a matter of efficiency, it would be the Civil Division of the Provincial Court which would assume this responsibility. Since the Surrogate Court is presently a provincial court, this change can be accomplished simply by provincial legislation. **It is recommended that the concurrent power of the High Court be continued in the Superior Court and that contentious matters may continue to be removed to the Superior Court. It is also recommended that the exclusive jurisdiction of the High Court to construe wills and give directions to executors be continued in the Superior Court.**

6.18 THE SIZE OF THE PROVINCIAL COURT

There are 241 Provincial Court judges in Ontario; 154 in the Criminal Division; 74 in the Family Division and 13 in the Civil Division. It is apparent that, with the enlarged jurisdiction as recommended above, the size of the Provincial Court will have to be increased. **It is recommended, however, that the increases be made only after it is apparent that all of the resources in personnel of the Provincial Court are being used to maximum advantage.**

6.19 A SUPERIOR COURT OF GENERAL JURISDICTION

The reorganization of the Provincial Court comprises the first half of the trial court system. Completion requires a superior court of general jurisdiction. The District Court and the High Court of Justice are of course both s. 96 courts. These two courts must, in some manner, be replaced by or converted into a single court of general jurisdiction. The conclusion was earlier expressed that simple merger of these two courts was not an appropriate solution. This conclusion is emphasized by the proposal made for the reorganization of the Provincial Court.

Because of the manner in which court records are kept (see Chapter 7 - Management of the Courts), it is difficult to say, with precision, how the various courts apportion their time. It is a reasonable conclusion, however, that shifting the family law cases, non-jury criminal trials, landlord and tenant cases, surrogate work and civil cases under $10,000 out of the District Court would have the effect of reducing by one-half to two-thirds the workload of the District Court (see Appendix 3). It is further apparent that the workload of the High Court will diminish to a degree by shifting family law cases out of that court. As a result of this considerable change in workload, there would simply be no point in adding approximately 150 District Court judges to the 49 judges of the High Court to comprise a single court of general jurisdiction. A court this large is simply not necesary.

On the other hand, it is apparent that the High Court cannot handle its present workload together with what remains of the work of the District Court. An enlarged court of general jurisdiction will be required.

Despite its relatively small size, the High Court of Justice is the logical vehicle to continue as the court of general jurisdiction. It is a non-statutory court with a long history and a tradition of industry, dedication and excellence. **It is recommended that, with appropriate modifications, the High Court of Justice should become the single s. 96 trial court for the province.**

Firstly, the court must be enlarged. It is difficult to say exactly how large the court should be. It is a reasonable assumption, however, that the number should equal the present complement of the High Court, plus approximately one-third of the number of judges in the District Court for a total of 100 judges. However, this enlarged court cannot continue to operate in the same way as the present High Court.

6.20 REGIONALIZATION

One of the principal criticisms levelled at the existing High Court is that it operates on a Toronto-centred circuit system. All of the submissions directed to this Inquiry that advocated a simple merger of the two courts went on to say that the merged court should be organized on a regional basis. Most of those who felt that there should not be merger and that the present hierarchy should be continued nevertheless agreed that the High Court should be reorganized on a regional basis.

The circuit system of travelling High Court judges served this province well and was particularly appropriate in an era when the population was small and thinly spread. It is likely, as well, that the Toronto-centred circuit system which required all the High Court judges to live in Toronto produced a degree of collegiality and consistency. However, it is the opinion of this Inquiry that the circuit system is a concept whose time has run out.

One of the principal advantages of the circuit system is that in major cases the community is sometimes better served by a judge who is a stranger to that community. There may still be considerable validity in this general proposition but this need can be met without obliging the membership of a general jurisdiction court to travel throughout the province. A regionally distributed judiciary can provide the same kind of detachment and there will be no need for any community to be served by a single judge.

The concept of collegiality, as envisaged by those who have spoken of it earlier, particularly The Honourable J.C. McRuer in the Royal Commission Inquiry into Civil Rights, has largely disappeared. The present court is already so large that it is doubtful whether this concept retains any validity. Consistency within the court can be accomplished more effectively through meetings and seminars than by requiring all of the judges to live in and work out of Toronto.

The circuit system is wasteful in that it requires all of the judges to spend a great deal of time travelling. It is inefficient in that it makes the businesslike planning of caseflow in the 48 county and district towns in Ontario extremely difficult, if not impossible. There is a very great need to make trial dates more predictable (fixed dates, if possible) in order that the public be inconvenienced no more than is absolutely necessary. The circuit system, which allows a travelling judge only a limited time in a given locality before being obliged to move on to still another community and to be replaced by another judge, is inconsistent with any rational system of orderly caseload management.

The Ontario circuit system has created a perception of diminished accessibility to the High Court for those who live outside of Toronto. It is apparent that there cannot be a superior court presence in every locality of Ontario. However, a regional concept would bring that institution much closer to the bulk of the people in Ontario.

There are some other, although lesser, reasons why the circuit system should be discontinued. This system discourages talented men and women from accepting appointments to the High Court. For those outside of Toronto, the cost of moving to Toronto, and the need to relocate at an age when moving and dislocating a family are difficult, are serious factors. Those who live and practise in Toronto and who have demanding family responsibilities are also often disinclined to accept the burden of the circuit.

These last reasons, of course, by themselves would not be sufficient to abandon the circuit if it in fact was essential to the justice system; but it is an anachronism and should be abolished.

It is the recommendation of this Inquiry that the High Court should be enlarged to a membership of 100 and that it be organized on regional lines (see Chapter 7 - Management of the Courts).

It is further recommended that within each region the sittings of each judge should be rotated in such a way that each community within the region is exposed to a variety of judges. It is not recommended, however, that there simply be minicircuits within each region patterned after the present circuit system. It is recommended that the judges should be rotated only when necessary to serve the needs of the region rather than on a ritual pattern which may be inconsistent with efficient case management.

The regional organization of the superior court and the boundaries of those regions should not be perceived as walls which will impede efficiency. Within reasonable limits, there should be a degree of movement by judges between regions. Inevitably, there will be variations in the caseloads between regions, and the chief justice of the superior court must have the authority to direct a judge from one region to help out in another. Further, judges may volunteer to go to another region temporarily to broaden their experience and this process should also be accommodated within the regional system.

The organization of the court along regional lines will require amendments to the Courts of Justice Act and will also require a repeal of s. 8 of the Judges Act which requires Supreme Court judges to live within 40 kilometres of Toronto. It is of some interest that there is no equivalent provision for any other province.

It is recommended that the legislation should simply provide that the judges of the court of general jurisdiction be required to live within the region to which they are assigned unless otherwise authorized by the Courts Management Committee.

Arising from the proposed regionalization of the Superior Court is the short term problem of allocating judges to the various regions. It is not proposed that any of the judges of the High Court be obliged to move. It is proposed that volunteers be sought from the High Court to move to the regions. This Inquiry is informed that a number would be willing to do so. New appointments, either from the District Court or the bar, would be made to specific regions. Assuming that there was still a shortfall in the number needed in some of the regions, the Toronto based judges would continue to travel to the regions until the total of the Toronto based judges was reduced to the number required in the Toronto region.

The number of judges to be assigned to each region should be determined by the Courts Management Committee and will depend upon the demand within that region. It is anticipated that at least 10 judges will be assigned to each region. **It is recommended that in each region, there should be an associate chief justice of the court who will direct the activities of the court.** It follows, from what has been outlined earlier, that the jurisdiction of the court will include anything not expressly assigned to the Provincial Court and, in particular terms, this would include the present jurisdiction of the High Court (except family law matters), together with the matters previously dealt with by the District Court and which have not been assigned to the Provincial Court, such as criminal jury trials, civil cases over $10,000 and the appellate functions of the District Court.

Finally, it is recommended that the court of general jurisdiction should be named the Superior Court of Ontario, a name which would more accurately reflect its position and function.

It will be recommended later in this report that the name "Supreme Court of Ontario" be assigned to the final appellate court.

It is also recommended that the Superior Court be separately constituted and no longer be simply a branch of the court which includes the appellate court.

6.21 THE DISTRICT COURT - ABOLITION

It is inherent in the foregoing that this Inquiry recommends that the District Court should be abolished. It is apparent that the changes which have been recommended will not occur overnight and that there will be a transitional period. It is therefore neither necessary nor desirable that the District Court be abolished quickly. Rather, it should be phased out and this phasing out operation can be accomplished in the manner set out below.

It is recommended that beginning forthwith, there should be no further appointments to the District Court bench. This should be arranged in cooperation with the federal government, and provincial legislation should be passed, which simply reduces the number of judges in the District Court as judges retire or accept other appointments. This process of reduction will culminate in the abolition of the District Court.

In a reorganized Superior Court, there will be a need for a substantial number of new judges, not only to raise the number from the present High Court complement to 100 but also to replace those on the High Court who may have been apppointed to the intermediate Court of Appeal (see section 6.25 below). **It is recommended that the appointing authorities look first to the members of the District Court when increasing the complement of the Superior Court.** There are a substantial number of judges on this court who have performed their duties with distinction and who have demonstrated the capacity to accept increased responsibility. It would be wasteful to make new appointments rather than transfer the most talented judges out of the District Court and thereby accelerate the disappearance of that court. It will, of course, be essential that appropriate inquiries be made from not only the Chief Judge and Associate Chief Judge of the District Court but also from those in the appellate courts, namely the Chief Justice of Ontario and the Associate Chief Justice of Ontario. Retirements and appointments to the Superior Court will accomplish a very large reduction in the complement of the District Court in a reasonably short time.

It is also recommended that, when the offices of Chief Judge and Associate Chief Judge of the District Court fall vacant, no new appointments be made to these offices but that the duties of the Chief Judge of the District Court be simply assigned to the Chief Justice of the Superior Court. It is proposed that during this phase out period, the judges who remain on the District Court will continue to perform judicial functions within that court. The District Court will continue to have jurisdiction over those things that have not been assigned to the Provincial Court, such as criminal jury trials, civil cases over $10,000 and below $25,000, and family law matters until the expanded jurisdiction in family matters of the Provincial Court is put in place. Thus, for a period of time, there will be a degree of concurrency between the District Court and the new Superior Court.

Historically, County and District Court judges have also sat as Small Claims Court judges. It is recommended that District Court judges continue to fulfill this function in the Provincial Court until such time as there is an adequate complement of full time Provincial Court judges to hear civil cases.

Currently, District Court judges are also local judges of the Supreme Court of Ontario. **It is recommended that District Court judges continue to be local judges of the Superior Court and that they perform such duties as may be assigned to them in that capacity by the Chief Justice of the Superior Court.**

The District Court has served the people of Ontario well for a very long period of time and the recommendation that it be abolished is made only after considerable reflection. The validity of the recommendation is underscored by the fact that the District Court judges themselves have, for many years, recognized the redundancy of their own court and have on many occasions urged its termination through merger. This Inquiry differs with those recommendations only in the selected means of termination.

With the eventual disappearance of the District Court, there remain some technical issues to be dealt with. There are approximately 100 Ontario statutes which assign specific statutory duties to District Court judges, ranging from the Absconding Debtors Act to the Workers Compensation Act. **In general, it is recommended that all of these statutory duties be assigned to the Provincial Court as a part of its civil jurisdiction. If, on a detailed review of these statutes, it is found that any one of these statutory duties is of particular or unusual importance, then that statutory duty should be assigned to the Superior Court.**

6.22 THE OFFICE OF MASTER

The masters are full time officers of the Supreme Court of Ontario, with broad powers relating to matters of procedure, references, estate matters and the assessment of costs. In most of the other provinces, there is no office of master in the Superior Court system, and the work done by the Ontario masters is done by judges. The office of master in Ontario underwent substantial change as a result of the recommendations of the Law Reform Commission in 1973.

Generally speaking, the operation of the master's office is satisfactory and this Inquiry makes no recommendation with respect to the nature of that office or its jurisdiction. There will, of course, necessarily be some changes that will flow from the reorganization of the court structure. The masters of the Supreme Court will become masters of the Superior Court. A substantial percentage of the work of the master's office flows from matrimonial cases. The assignment of matrimonial cases to the Provincial Court will, to some extent, diminish the workload of the masters. Additionally, the regional structure of the Superior Court will necessitate some changes. At present, there are masters in Toronto, Ottawa, London and Windsor. The regional structure will eventually require masters in each of the regions. On a transitional basis, however, many of the functions of the master should be performed by District Court judges in their capacity as local judges of the Superior Court. The determination of the total number of masters required and their allocation among the various regions can only be determined on businesslike principles by the Courts Management Committee as the process of reorganization proceeds.

6.23 FAMILY LAW COMMISSIONERS

It is implicit in the foregoing recommendations that the office of family law commissioner in the present High Court of Justice will disappear. There are three full time family law commissioners, two in Toronto and one in Ottawa. **It is recommended that the family law commissioners should be offered apppointments as Provincial Court judges, with a view to devoting most of their time to the hearing of family law cases.**

6.24 THE APPELLATE COURTS

As outlined in Chapter 3, almost every court in this province exercises some appellate jurisdiction. This section will be concerned with only the Court of Appeal and the Divisional Court. The Court of Appeal is, of course, the court of general appellate jurisdiction for this province. The Divisional Court, in addition to its duties as a judicial review court, also functions as an appellate court. There is an appeal from the Divisional Court with leave to the Court of Appeal.

An appeal court discharges two functions: the first is simply to correct errors in the judgment that is the subject of the appeal and resolve the dispute between the parties; the second function is to explain the law and develop the jurisprudence of the province. The first function is of paramount importance to the parties before the court, but the second function may have a great impact on others. Parties involved in similar disputes who have advanced to the litigation stage and those who are not yet involved in the courts, but who simply wish to govern their affairs in the light of an authoritative statement of the law, need a court of appeal which performs a jurisprudential function.

The respective importance of these two functions will vary with the case and also with the level of the court. In many cases, there will be little or no room for the existence of the second function. The case will call only for the application of well-accepted principles to new facts. Similarly, within our present hierarchical system of courts, the decision of a single judge sitting in appeal from another judge will not ordinarily have a great impact upon our jurisprudence. However, it is obvious that a final court of appeal for this province is charged with the primary responsibility of developing the jurisprudence for this province. This view does not ignore the fact that there exists at least the possibility of a further appeal to the Supreme Court of Canada, the decision of which represents the ultimate definition of the law.

Since almost all appeals to the Supreme Court of Canada are now by leave of that court, it of course determines the number of cases it will accept. In 1977, Mr. Justice Arthur Kelly said in his Report of the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario:

> Since the target of the Supreme Court of Canada is to hear something less than one hundred and fifty appeals a year, it is reasonable to estimate that 90% of the appeals decided in Ontario will not have the opportunity of being reviewed in the Supreme Court of Canada. The practical result of this situation is that henceforth the decisions of the courts of Ontario will develop the jurisprudence of Ontario. [at 13]

The situation has changed markedly since 1977. The number of appeals heard by the Supreme Court of Canada in recent years is substantially less than 150. It is now down to below 90 and there is the suggestion that, because of the backlog, it may be reduced to 60 for a period of years until the backlog has been caught up. It is likely that the number of appeals from Ontario will be no more than one-third of the total of the Supreme Court docket for the foreseeable future. In 1986, leave was given by the Supreme Court in only 15 appeals from the Ontario Court of Appeal.

All of this serves only to emphasize the increasing need for the final court of appeal in Ontario to fulfill its jurisprudential role.

Despite the need for the final court of appeal in Ontario to give increasing attention to developing the jurisprudence of this province, it is a matter of general agreement by the Court of Appeal and the bar that it is becoming progressively less able to do so.

In 1968, the Honourable J.C. McRuer, in his report, The Royal Commission Inquiry into Civil Rights, stated:

> Under present conditions it is quite impossible for the judges of the Court of Appeal in Ontario adequately to meet their responsibility as judges of the court of last resort in the Province. They are compelled, by force of circumstances, to dispose of cases on a sort of assembly-line basis. They are forced to choose between the prompt disposition of appeals by a court of three judges, and the painstaking deliberation by a court of five judges which the work of an ultimate court of appeal for the Province demands. [Vol.2, at 661]

In 1968, the Court of Appeal heard 528 criminal appeals and 397 civil appeals for a total of 925 appeals. In 1986, the court heard and disposed of a total of 1,544 appeals (479 civil appeals and 1,065 criminal appeals), and as of December 31, 1986, there were 3,024 appeals pending (920 civil appeals and 2,104 criminal appeals). The increase in the caseload, while of some significance, does not reflect the real increase in the workload in the Court of Appeal because the cases which are heard are increasingly longer and more difficult.

Many long appeals involve the Canadian Charter of Rights and Freedoms. Others simply reflect the increasingly complex nature of modern litigation.

In an attempt to cope with the problem, the court has been enlarged. At the time of the McRuer Report (1968), the Court of Appeal was composed of ten judges. Now, as a result of a series of legislative changes, the court is composed of 16 judges and two supernumerary judges. These additions to the court have succeeded only in enabling the court to cope with the caseload but have not substantially enhanced the capacity of the court to meet its jurisprudential responsibilities. Even with a great deal of night and weekend work, the pressure of the volume of cases has obliged the court to commit most of its capacity to simply resolving the disputes between an ever increasing number of litigants.

Ironically, the expansion of the court has produced problems of its own. The court is now very large. Sitting as it generally does in panels of three, it is not uncommon for three or four panels to be sitting at the same time (the balance being spelled off to write judgments). As a result, a measure of inconsistency has crept into the judgments of the court. This is not surprising since it would be almost impossible to develop a completely consistent policy in a court which has grown so large.

In another step taken to remedy the problem, the appellate jurisdiction of the Divisional Court was increased by the Courts of Justice Act to enable that court to hear appeals in which the amount in dispute is not over $25,000. This change, of course, has had no impact on criminal appeals and has had a relatively insignificant effect on the civil caseload in the Court of Appeal.

It is obvious that a solution must be found. The range of solutions is not great. A further expansion of the number of judges on the court would obviously increase the capacity to cope with the volume but would necessarily diminish the consistency and predictability of the court. The institution of a separate court of appeal for criminal cases commands very little support.

As one might expect, the problem which now confronts us has confronted most of the American states. The solution in the United States has been to establish an intermediate court of appeal. Thirty-eight states have now adopted this solution. The largest state (in terms of population) which does not yet have an intermediate court of appeal is Mississippi, which has a population of approximately 2.5

million, and that state is now studying the feasibility of instituting such a court. All of the states with populations close to that of Ontario (in excess of nine million) have had such courts for relatively long periods of time.

It would be wrong to suggest that the institution of an intermediate court of appeal is a perfect solution; it is not. It is, however, a better solution than any other. There are substantial benefits which will flow from this type of reorganization. Firstly, resort to an appellate court can be made more accessible to the people of Ontario. At present, the Court of Appeal sits only in Toronto, with periodic sittings in Kingston to hear prisoner appeals. However, an enlarged intermediate court of appeal can be an itinerant court and can sit in the major population centres in Ontario as the number of cases requires. Secondly, an intermediate court can be indefinitely expanded as the caseload requires. The work of this court will no doubt make a significant contribution to the development of the law in this province but its primary function will be to cope with the caseload and resolve disputes between the parties.

The final court of appeal can be a small court of seven judges sitting only in single panels as the chief justice directs, and will hear appeals by leave from the intermediate court. This court will then be free to give the cases it hears a very deliberate consideration and to produce written decisions which will be of real assistance to the trial courts and people of this province.

Opponents of the concept of an intermediate court of appeal state that this court merely adds another layer to the court system and that this new layer will increase the cost of litigation. However, the cost to the overwhelming majority of litigants will not be increased. Only a very small percentage of cases tried in Ontario are appealed at all. A second appeal would be by leave only and therefore only a very small percentage of those cases would reach the level of a second appeal. In the end result, the number of cases reaching the second appeal level would be an almost infinitesimal percentage of the total of the cases tried in Ontario.

In approaching the problem of the reorganization of the appellate courts in this province, it is unnecessary to create new courts. With some changes, the courts already in existence can be converted into a final and intermediate court of appeal.

6.25 THE INTERMEDIATE COURT OF APPEAL

It is recommended that the Divisional Court, which is already an appellate court, should be converted into the intermediate court of appeal for this province. Accomplishing this end, however, will require some important changes. Firstly, the court must be made a permanent court. As now organized, the Divisional Court is a division of the High Court. The High Court, with a total complement of 49, supplies the judges to the Divisional Court, which sits in one or two panels of three. The assignments vary in length and often long periods of time will elapse between assignments while the judges fulfill their principal role as trial judges. This structure has produced substantial criticism in that the rotational nature of the court has created a court that lacks definition. The changing composition produces unpredictability and inconsistency. This problem, of course, would be exacerbated if an intermediate court of appeal continued to draw from the trial judges of the enlarged Superior Court recommended earlier. **It is recommended and considered essential that the intermediate Court of Appeal should be constituted as a separate court, with permanent appointments and its own chief justice. Secondly, the name should be changed. The name, Divisional Court, while of historical significance,**

means little or nothing to the public. The name should be changed to the Court of Appeal.

It is recommended that the jurisdiction of the new Court of Appeal should include all appeals, both civil and criminal, which are heard by either the present Court of Appeal or the Divisional Court. In addition, this court should retain the jurisdiction of the Divisional Court as a judicial review court. The principles governing appeals and judicial review are not entirely dissimilar and there is no reason why a single court cannot handle both functions. There are, however, some matters of judicial review which can be assigned to a single judge of the Superior Court, as was the practice prior to the creation of the Divisional Court. As a beginning, the review of the decisions of a single arbitrator should be handled by a single judge of the Superior Court. The work of judicial review in the intermediate appeal court should be monitored by the Courts Management Committee (see Chapter 7) with a view to recommending the further allocation of judicial review jurisdiction to the Superior Court. It is likely that the bulk of the work of the court will be performed in Toronto, but the intermediate court of appeal should be an itinerant court. **It is recommended that the new Court of Appeal should sit in all of the regions in the province as the volume of business requires.**

It is recommended that the intermediate court should sit in panels of three judges. Since there can be resort to a final court of appeal, it will not be necessary for this court to sit in panels of five judges.

It is not easy to determine just how large the intermediate court of appeal should be. It seems obvious that it should be at least as large as the combined size of the present court of appeal (18 judges) and the Divisional Court (usually 6 judges). **It is therefore recommended that, at least in the beginning, the new Court of Appeal should be**

made up of a chief justice and 24 judges.

Initially, however, the new Court of Appeal would be assisted by some of the judges from the final court of appeal (see section 6.26 below). It would therefore not be necessary to appoint all 25 judges immediately. **It is further obvious that the best talent pool from which to draw appointees to the new intermediate court is the present High Court, and it is recommended that appointments be made from that court.**

The temporary use of some of the members of the final Court of Appeal on the new Court of Appeal will have the beneficial effect of imparting to the new court a great deal of appellate experience. This experience will be of considerable importance to this new court in its beginning years.

It is also critical that this new court receive capable and experienced leadership. **It is therefore recommended that the office of chief justice of the new Court of Appeal be offered to the Associate Chief Justice of Ontario.**

6.26 THE FINAL COURT OF APPEAL

It is recommended that the present Court of Appeal should be converted into the final court of appeal. There are as one might expect a few problems, but these can be resolved without difficulty.

Firstly, the present court is too large to be a final court of appeal. A seven judge court consisting of a chief justice and six judges would be adequate. There will, of course, be a transitional period and, during that time, no new appointments should be made to the existing Court of Appeal until the court, through retirements and elections to accept supernumerary status, has been reduced to a total of seven judges. **Until that point is reached, it is recommended that the active final court should be composed of: the Chief Justice of Ontario, and six judges of the existing Court of Appeal designated by the Chief Justice of Ontario on a yearly rotational basis so as to offer each judge of the existing court a chance to serve on the new court. This rotation should ensure that each judge, other than the Chief Justice, is assigned equal time on the final court. In a court of such diminished size, there would be no need for an Associate Chief Justice of Ontario. When that office becomes vacant, it should be abolished.** Obviously, for a time, there will be an excess capacity in the court For that reason, **it is recommended that all of the judges of the final court of appeal should be ex officio members of the intermediate court and should be assigned to the intermediate court during those periods in which they are not assigned to the final court.** The ex officio status will also provide a solution to the problem that will arise when members of the final court wish to elect supernumerary status. In order to achieve consistency, it is essential that the number of judges on the final court remain fixed and should not be enlarged by the utilization of supernumerary judges. Judges of the final court who elect supernumerary status should be assigned to the intermediate court.

It is recommended that the final court of appeal should be given the name of "Supreme Court of Ontario". This title gives the general public a clear indication of this court's position at the apex of the court hierarchy in Ontario.

6.27 JURISDICTION OF THE FINAL COURT OF APPEAL

As outlined earlier, it is not intended that ordinary cases be the subject of more than one appeal. In the overwhelming majority of cases that are appealed, their progress through the judicial system will end in the intermediate court. It is only cases of exceptional difficulty and importance that should be heard by the final court and that court must have the ability to control its own caseload. **It is therefore recommended that an appeal should lie from the new Court of Appeal to the Supreme Court of Ontario only with leave of the final court. It is recommended that the legislation providing for the further appeal to the final court be phrased in general terms and that it be left to the final court to develop the criteria for leave.**

It is recognized that there will be a very small number of cases whose exceptional quality is so obvious that the intermediate Court of Appeal should be bypassed, and that those cases should proceed directly to the Supreme Court of Ontario. It is further recognized that in a minute number of cases, the intermediate Court of Appeal, because of conflicting decisions from its own panels, may wish to transmit a case directly to the final court.

It is therefore recommended that:

1. **In exceptional cases, the new Supreme Court of Ontario may order that an appeal bypass the new Court of Appeal and proceed directly to the final court;**
2. **Where there are conflicting decisions by different panels of the new Court of Appeal on a matter involved in a proposed appeal, the Court of Appeal itself may order that the appeal proceed directly to the new Supreme Court of Ontario.**

In order to fulfill its jurisprudential role, **it is recommended that in the hearing of appeals, the new Supreme Court of Ontario sit either as a full court or as a panel of five, but in no case as a court of only three judges. It is further recommended, however, that in the hearing of motions for leave to appeal, the court may sit in panels of three judges.**

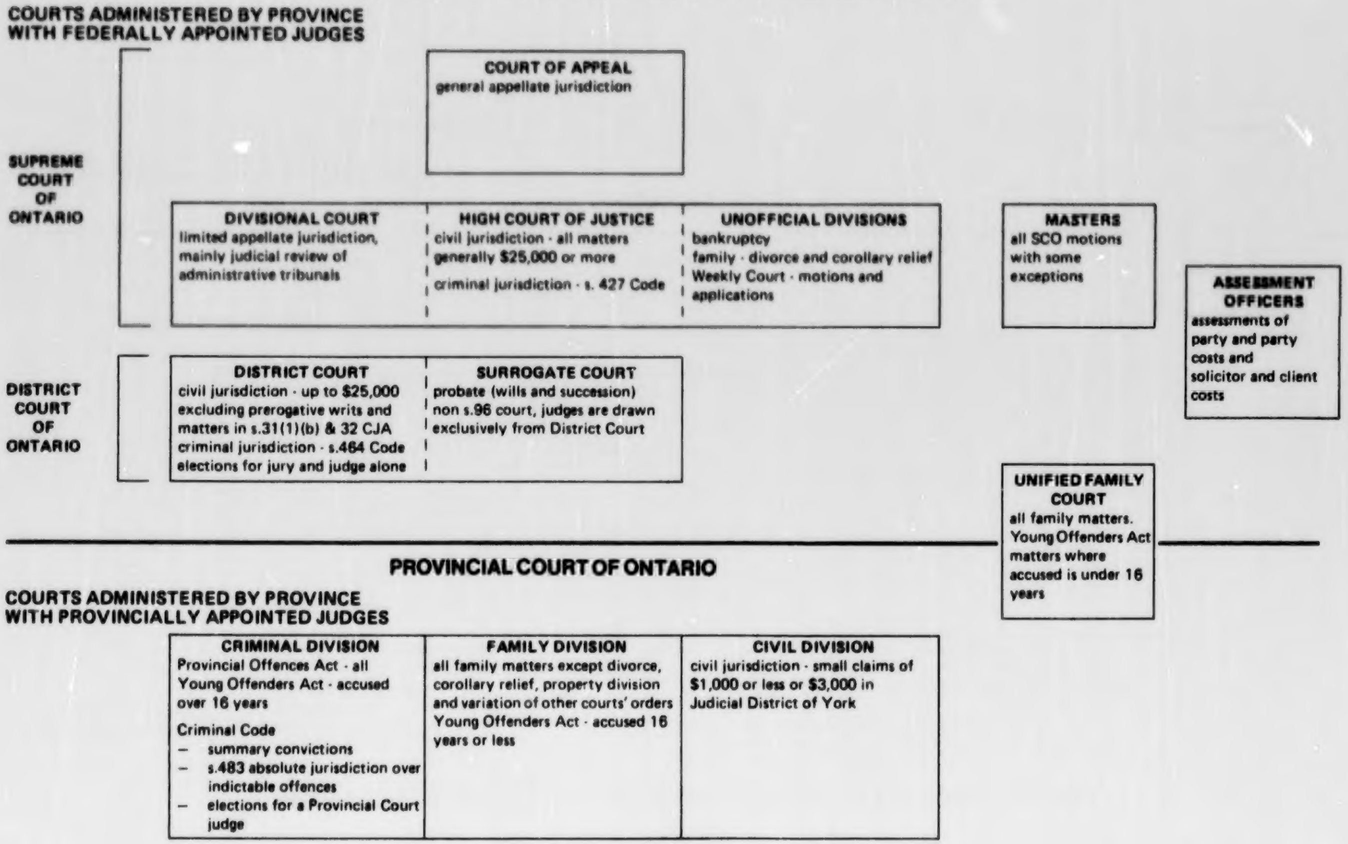
6.28 FINAL COURT - ADDITIONAL JURISDICTION

Section 19 of the Courts of Justice Act provides that the Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration. **It is recommended that s. 19 of the Courts of Justice Act be amended to provide that such references be heard by the new Supreme Court of Ontario.**

Section 617 of the Criminal Code confers special powers on the Minister of Justice to refer matters to the Court of Appeal. **It is recommended that s. 617 of the Criminal Code should be amended to provide that in Ontario these references be heard by the new Supreme Court of Ontario.**

TABLE 1

JURISDICTION AND STRUCTURE OF ONTARIO COURTS



COURTS ADMINISTERED BY PROVINCE WITH FEDERALLY APPOINTED JUDGES

SUPREME COURT OF ONTARIO

COURT OF APPEAL
general appellate jurisdiction

DIVISIONAL COURT
limited appellate jurisdiction, mainly judicial review of administrative tribunals

HIGH COURT OF JUSTICE
civil jurisdiction · all matters generally $25,000 or more
criminal jurisdiction · s. 427 Code

UNOFFICIAL DIVISIONS
bankruptcy
family · divorce and corollary relief
Weekly Court · motions and applications

MASTERS
all SCO motions with some exceptions

ASSESSMENT OFFICERS
assessments of party and party costs and solicitor and client costs

DISTRICT COURT OF ONTARIO

DISTRICT COURT
civil jurisdiction · up to $25,000 excluding prerogative writs and matters in s.31(1)(b) & 32 CJA
criminal jurisdiction · s.464 Code elections for jury and judge alone

SURROGATE COURT
probate (wills and succession)
non s.96 court, judges are drawn exclusively from District Court

UNIFIED FAMILY COURT
all family matters.
Young Offenders Act matters where accused is under 16 years

PROVINCIAL COURT OF ONTARIO

COURTS ADMINISTERED BY PROVINCE WITH PROVINCIALLY APPOINTED JUDGES

CRIMINAL DIVISION
Provincial Offences Act · all
Young Offenders Act · accused over 16 years

Criminal Code
- summary convictions
- s.483 absolute jurisdiction over indictable offences
- elections for a Provincial Court judge

FAMILY DIVISION
all family matters except divorce, corollary relief, property division and variation of other courts' orders
Young Offenders Act · accused 16 years or less

CIVIL DIVISION
civil jurisdiction · small claims of $1,000 or less or $3,000 in Judicial District of York

TABLE 2

PROPOSED STRUCTURE AND JURISDICTION OF ONTARIO COURTS

COURTS ADMINISTERED BY PROVINCE WITH FEDERALLY APPOINTED JUDGES

SUPREME COURT OF ONTARIO
- general appellate jurisdiction - by way of leave only

COURT OF APPEAL
- general appellate jurisdiction including judicial review of decisions of administrative tribunals

SUPERIOR COURT OF ONTARIO
- general criminal and civil jurisdiction, with the exception of those matters assigned by statute to other courts
- limited appellate jurisdiction

MASTERS
- all Superior Court motions with some exceptions

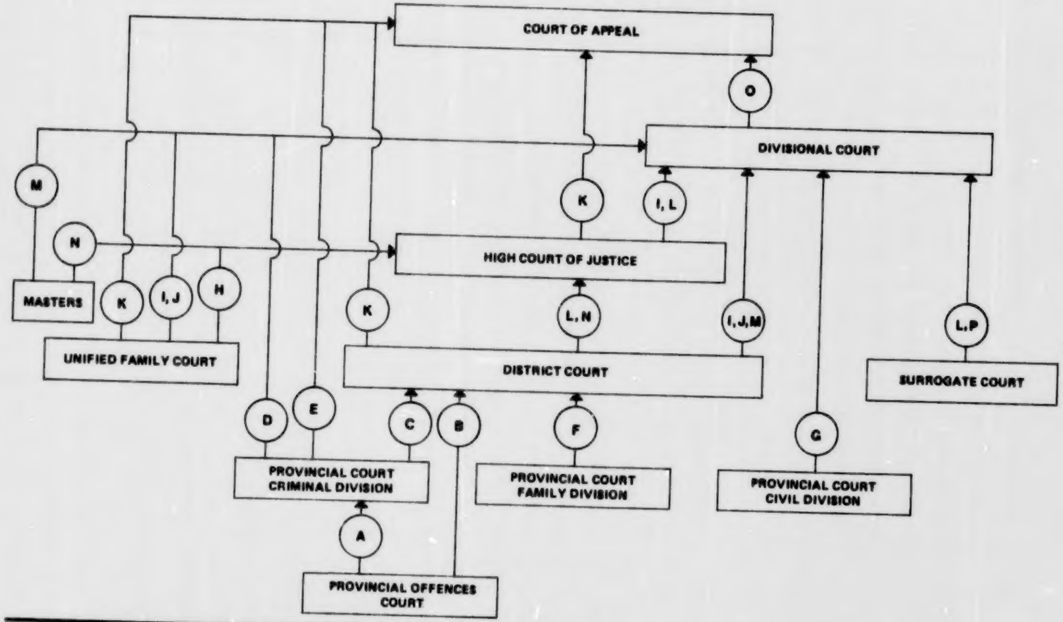
ASSESSMENT OFFICERS
- assessment of party and party costs and solicitor and client costs.

PROVINCIAL COURT

COURTS ADMINISTERED BY PROVINCE WITH PROVINCIALLY APPOINTED JUDGES

CRIMINAL JURISDICTION	FAMILY JURISDICTION	CIVIL JURISDICTION	YOUTH COURT JURISDICTION	PROBATE JURISDICTION
Provincial Offences Act - all Criminal Code: – summary conviction offences – absolute jurisdiction over lesser indictable offences (s. 483) – consent jurisdiction in most indictable offences (s. 484)	– all family matters	– all matters up to $10,000 – landlord and tenant	– Young Offenders Act - all	– wills and succession

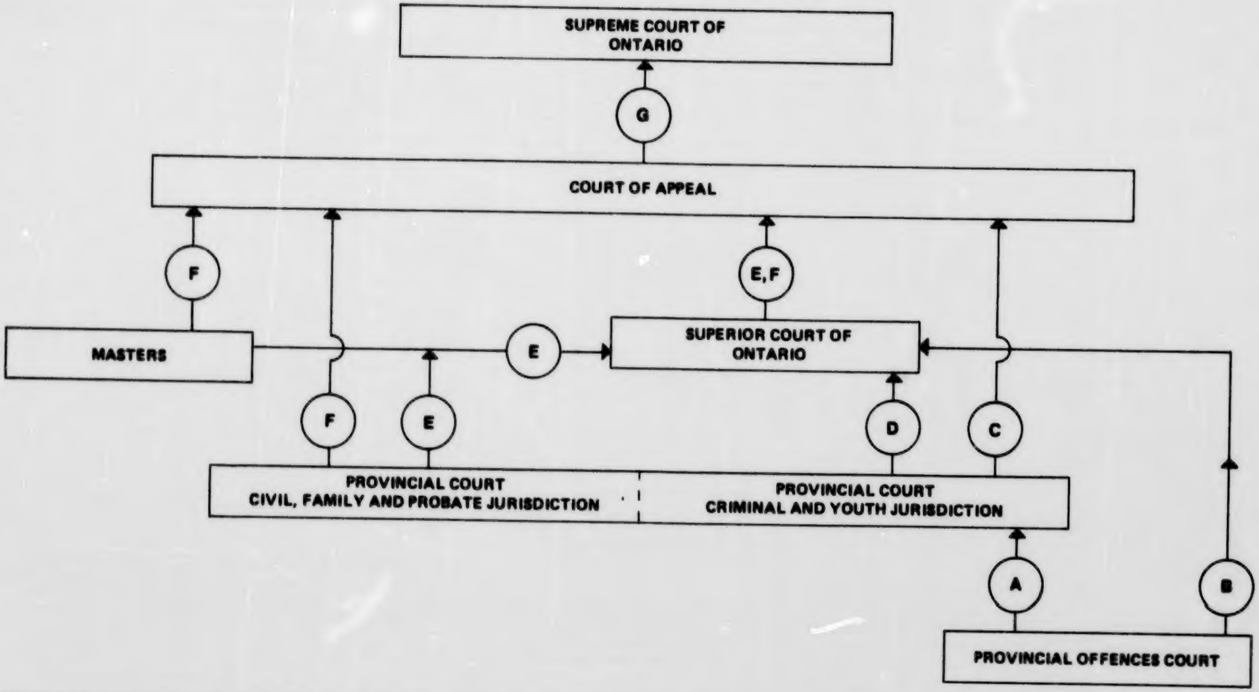
TABLE 3
PRESENT ROUTES OF APPEALS


COURT OF APPEAL
O
DIVISIONAL COURT
M
K
I, L
N
HIGH COURT OF JUSTICE
MASTERS
K
I, J
H
K
L, N
I, J, M
L, P
UNIFIED FAMILY COURT
DISTRICT COURT
SURROGATE COURT
D
E
C
B
F
G
PROVINCIAL COURT CRIMINAL DIVISION
PROVINCIAL COURT FAMILY DIVISION
PROVINCIAL COURT CIVIL DIVISION
A
PROVINCIAL OFFENCES COURT

A – appeals under Parts I & II of the POA, and Part II if heard by a justice of the peace
B -- appeals under Part III if the matter heard by a Provincial Court judge
C – summary conviction appeals, generally
D – summary conviction appeal by way of stated case
E – indictable offences
F – FLA, CFSA and most other matters
G – final orders over $500
H – interlocutory orders which could be made by a DCO judge
I – final orders where the amount is $25,000 or less
J – interlocutory orders made in capacity as local judge
K – final orders where the amount is more than $25,000
L – interlocutory orders
M – final orders within jurisdiction of a master
N – interlocutory orders within the jurisdiction of a master
O – final orders on a question of law with leave
P – final orders

TABLE 4

PROPOSED APPEAL ROUTES


SUPREME COURT OF ONTARIO
G
COURT OF APPEAL
F
E,F
MASTERS
E
SUPERIOR COURT OF ONTARIO
F
E
D
C
PROVINCIAL COURT CIVIL, FAMILY AND PROBATE JURISDICTION
PROVINCIAL COURT CRIMINAL AND YOUTH JURISDICTION
A
B
PROVINCIAL OFFENCES COURT

A – appeal from a justice of the peace
B – appeal from a Provincial Court judge
C – indictable offences (including youth jurisdiction)
D – summary conviction appeals (including youth jurisdiction)

E – appeals from interlocutory orders
F – appeals from final orders
G – appeals by way of leave only

CHAPTER 7

Management of the Courts

7.1 SCOPE OF THE CHAPTER

In this chapter, the word "courts" is used in its broadest sense to cover the people, the buildings and the operational procedures that form part of the system of courts in Ontario. The people in the court system include both the judiciary and the support staff working within the court system.

This chapter contains a discussion of how the people, both judges and administrators, working within the courts should be organized, in terms of structure, hierarchy, direction and supervision and geographical location. The matter of how the courts should be housed is dealt with separately in Chapter 9, but this chapter will deal with some aspects of management of the court buildings and the provision of security in them. In the area of operational procedures, the principal focus will be measures to deal with caseload and caseflow.

7.2 INTRODUCTION

Court administration in Ontario has always been a patchwork quilt. It has never been approached in a systematic fashion by either the government or the judiciary until very recently. Despite the major reorganizations of the courts that took place in 1969 after passage of the Provincial Courts Act and on passage of the Courts of Justice Act in 1984, little has changed in court administration in this province since Confederation.

What follows (in sections 7.3 to 7.15) is a brief outline of the present management picture, both administrative and judicial, for all of the courts.

7.3 PROVINCIAL COURT (CIVIL DIVISION) - PRESENT ADMINISTRATIVE STRUCTURE

The Division Courts, later Small Claims Courts and since 1985 the Provincial Court (Civil Division), began life in 1841 as independent franchise operations with territorial jurisdiction limited to a portion of a county or district. The administrative staff of each court was paid out of the fees generated by that individual court location. To a great extent the Civil Division still operates in the same way, although many of the local courts are now subsidized by the province, and some of the larger courts are partially or fully staffed by civil servants. Each location of the Provincial Court (Civil Division) is headed by a clerk, and each location has its own bailiff responsible for the service of process. Some local courts have a "referee", who functions as a pre-trial or postjudgment mediator. The clerks, bailiffs and referees of the Provincial Court (Civil Division) are appointed by order in council, that is, by the provincial Cabinet. The 41 clerks, 41 bailiffs, 72 clerk-bailiffs and 16 referees scattered in 113 locations around the province all report to a branch director at the Ministry of the Attorney General in Toronto. There is no hierarchy within the Provincial Court (Civil Division) system other than that just described, and there is no grouping or linking of Provincial Court (Civil Division) locations, even within the same county or district.

7.4 PROVINCIAL COURT (CRIMINAL DIVISION) AND (FAMILY DIVISION) AND PROVINCIAL OFFENCES COURT - PRESENT ADMINISTRATIVE STRUCTURE

The Criminal Division and Family Division of the Provincial Court were both created by legislation passed in 1968. Before that time, these courts were known as Magistrates' Courts and Juvenile and Family Courts, and they were administered and staffed by the municipalities in which they operated. As part of the reorganization of those courts effected by the 1968 legislation, the province took over the administrative side and all of the administrative staff became provincial employees. Until the Courts of Justice Act came into effect in 1985, each county and district had its own separate Provincial Court (Criminal Division) and Provincial Court (Family Division), with territorial jurisdiction limited to that county or district. The Courts of Justice Act fused all of the Provincial Courts (Criminal Division) into one province-wide court, and did the same for the various Provincial Courts (Family Division). However, the administrative staff of the province-wide Provincial Court (Criminal Division), as well as that of the province-wide Provincial Court (Family Division), remains organized in the same manner as when the province took over administration in 1969.

Generally, the administration and staff of the Provincial Court (Criminal Division) are separate from those of the Provincial Court (Family Division) at each court location, although in some smaller centres there is a combined court office for both Criminal Division and Family Division. In each of 48 counties and districts, there is a clerk for each division (often called the administrator), and the clerks all report to a branch director at the Ministry of the Attorney General in Toronto. As is the case with the Civil Division, there is no other hierarchy within the Criminal or Family Division administrative organization and there are no links between the court locations within a division. There are no structural or operational links between the Criminal Division and the Family Division operating in a particular location except in the smaller centres where a combined office exists. There are no links between the Civil Division and the Criminal and Family Divisions of the Provincial Court; the Civil Division reports to a different branch director.

The Provincial Offences Court is administered as an integral part of the Criminal Division and has no separate organization of its own.

7.5 YOUTH COURT - PRESENT ADMINISTRATIVE STRUCTURE

The federal Young Offenders Act, which deals with the prosecution and punishment of persons under the age of 18 who have committed criminal offences, refers to a "youth court". The Act defines the youth court as a court established or designated by a province as a youth court for the purposes of the Act. Ontario has designated both the Provincial Court (Family Division) and the Provincial Court (Criminal Division) as youth courts. Administratively, the youth court workload has been divided so that the Family Division deals with young offenders under the age of 16, and the Criminal Division deals with young offenders of the age of 16 or 17. This administrative division of the workload is accomplished by having the police lay charges in the appropriate division of the Provincial Court, depending on the age of the young offender.

7.6 UNIFIED FAMILY COURT - PRESENT ADMINISTRATIVE STRUCTURE

The Unified Family Court exists at present only in the Regional Municipality of Hamilton-Wentworth. It is a hybrid structure, embodying elements of the Provincial Court (Family Division), the District Court and the Supreme Court, and has jurisdiction to hear all family law matters involving a resident of that regional municipality. The Provincial Court (Family Division) does not exist in Hamilton-Wentworth, and the District and Supreme Courts do not have any family law jurisdiction there. This single, isolated court was intended to be the pilot project for a province-wide network of Unified Family Courts, but no geographical expansion has taken place since its creation in 1977. From the administrative side, the court forms part of the organization of the Provincial Court (Family Division) and its clerk reports to the same branch director in Toronto as do the clerks of that division. There are no administrative links between the Unified Family Court and the other courts operating in Hamilton-Wentworth.

7.7 DISTRICT COURT, SURROGATE COURT AND SUPREME COURT - PRESENT ADMINISTRATIVE STRUCTURE

The District Court, Surrogate Court and Supreme Court are functionally one administrative structure, except that in Toronto, where the volume is sufficient to support it, separate offices and separate administrative staffs are maintained. In each of 48 counties and districts, there is a local registrar for each of the District Court, Surrogate Court and Supreme Court, but the practice is to appoint the same person to the three posts except in Toronto.

Until the passage of the Courts of Justice Act, each county and district had its own separate county or district court, but the Courts of Justice Act fused all of these into a province-wide District Court of Ontario. The administrative structure of the District Court did not change at all after the passage of the Courts of Justice Act, and indeed that Act requires that there be a local registrar for the District Court in each county and district. Similarly, the Act requires a local registrar of the Supreme Court for each county and district, and the Surrogate Courts Act requires a surrogate registrar in each county and district.

7.8 SHERIFFS

In addition to the office of local registrar for the District Court and Supreme Court, the ancient office of sheriff continues to exist in Ontario. The office of sheriff dates back to the Saxon kingdoms of England before the Norman conquest in 1066. Whatever may have been the original functions of the office, the sheriff is now responsible in Ontario for the service of court documents (although the sheriff does not have a monopoly in that area), the carrying out of the courts' orders (principally the seizure and sale of property to satisfy judgments of the courts, but also evictions and occasionally arrests), the summoning of jurors, the maintenance of order in courtrooms and court buildings and the provision of security for judges. Historically, the sheriff has been most closely associated with the Supreme and District Courts. Under the Sheriffs Act, there is a sheriff for every county and district. In many of the smaller centres, the local registrar of the District and Supreme Courts is also appointed as sheriff.

7.9 OFFICIAL EXAMINERS

Rounding out the administrative picture, there is the office of official examiner for the courts. The official examiner is responsible for presiding at and providing court reporters for the out of court examinations of witnesses that frequently take place in legal proceedings in Ontario, either before a trial or in the course of attempting to enforce a judgment. In most counties and districts, the local registrar is also appointed the official examiner. The exceptions are the larger centres such as Windsor, London, Hamilton, Toronto and Ottawa, where persons operating in the private sector are appointed as official examiners and the registrar does not provide the service.

7.10 RECENT CHANGES IN THE ADMINISTRATIVE STRUCTURES

In recent years, the Ministry of the Attorney General has moved to create a regional structure for the sheriffs and local registrars, but the functions of the regional structure have not progressed beyond the exchange of information and advice among registrars and sheriffs. A regional coordinator has been designated from among the registrars and sheriffs for each region, but the regional coordinator does not have any management responsibility or supervisory functions over the other registrars and sheriffs in the region. The position is more one of informal leadership and advice and assistance than anything else. There is no other hierarchical structure in the District and

Supreme Court Court organizations, and all registrars and sheriffs report to a branch director at the Ministry of the Attorney General in Toronto.

7.11 THE RESPONSIBILITY OF THE ATTORNEY GENERAL

Section 91 of the Courts of Justice Act directs the Attorney General to "superintend all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary". Section 93 gives the judiciary "authority over the preparation of trial lists and the assignment of courtrooms to the extent necessary to control the determination of who is assigned to hear particular cases". Section 95 provides that, "in matters that are assigned by law to the judiciary", court staff must act at the direction of the chief judge of the particular court, and court staff working in a courtroom must act at the direction of the presiding judge while the court is in session. The legal framework under the Courts of Justice Act will become important in the discussion of the meaning and extent of judicial independence: see section 7.18 below.

Section 92 of the Courts of Justice Act establishes the Ontario Courts Advisory Council, comprising the chief judges and associate chief judges of the various courts. The council is empowered to "consider any matter relating to the administration of the courts ... and to make recommendations thereon to the Attorney General" and the chief judges. This body is purely advisory and has no management reponsibilities. A similar body, not mentioned in the Courts of Justice Act, is the Bench and Bar Council, which consists of the chief judges and associate chief judges and representatives of the bar and the Ministry of the Attorney General. This body is an advisory body as well.

Within the Ministry of the Attorney General, responsibility for courts administration rests in the hands of an Assistant Deputy Attorney General, who heads the Courts Administration Division of the Ministry. The Assistant Deputy Attorney General has in his division an executive director responsible for courts administration, to whom the branch directors for the Supreme and District Courts, the Provincial Court (Criminal Division) and (Family Division) and the Provincial Court (Civil Division) all report. There is also a branch director for facilities and special court services, an office of judicial support services and a court facilities, planning and maintenance section.

7.12 PROVINCIAL COURT AND PROVINCIAL OFFENCES COURT - PRESENT JUDICIAL STRUCTURE

The present judicial structure of the Provincial Court and the Provincial Offences Court is described in sections 3.2 to 3.6 above. It is sufficient to note that the Criminal and Family Divisions have been regionalized under senior judges, but in different ways: the Criminal Division is divided into eleven regions, the Family Division into only seven, and nowhere are the boundaries of a region in one division congruent with those of a region in the other division. The Civil Division has no senior judges, and its chief judge presides over thirteen full time provincial judges in four cities and an unknown number of deputy judges in the other 100 locations. Section 63(5) of the Courts of Justice Act excludes from the supervisory authority of the chief judge of the Civil Division any of the local courts presided over by judges of the District Court.

Justices of the peace presiding in Provincial Offences Court are, by virture of s. 6 of the Justices of the Peace Act, subject to the direction and supervision of the chief judge of the Criminal Division. This power can be and has been delegated to various Criminal Division judges, who exercise different levels of supervision in different places.

7.13 UNIFIED FAMILY COURT - PRESENT JUDICIAL STRUCTURE

The Unified Family Court is a hybrid creature, with informal links to but not really forming part of the organization of the Provincial Court (Family Division) and the District Court. Its judges are appointed as District Court judges in the first instance, and accordingly are subject to the authority of the Chief Judge of the District Court. Although they are not appointed as provincial judges, they receive an order in council authorizing them to exercise the jurisdiction of a provincial judge, and in the past the Chief Judge of the Provincial Court (Family Division) has been recognized as having a role to play, at least informally, with the judges of the Unified Family Court. Only in 1987 was the post of senior judge for the Unified Family Court created. It is interesting to note that the senior judge of the Unified Family Court is not expressly subject to the authority of the Chief Judge of the District Court: see s. 39a of the Courts of Justice Act, added in 1987.

7.14 DISTRICT AND SURROGATE COURTS - PRESENT JUDICIAL STRUCTURE

The structure of the District Court is described in section 3.8 above. The positions of chief judge and associate chief judge were created in 1962 and 1977, respectively. The court was organized into eight regions under the leadership of regional senior judges, but the office of regional senior judge disappeared on passage of the Courts of Justice Act in 1984. The eight regions do not coincide in any respect with the regions into which the Provincial Court (Criminal Division) or (Family Divison) is divided.

The Surrogate Court really has no separate existence from the District Court.

7.15 SUPREME COURT - PRESENT JUDICIAL STRUCTURE

For the structure of the Supreme Court generally, see sections 3.11 to 3.18 above. The High Court has had a chief justice (and sometimes a chief justice for each of its divisions) since 1794, and an associate chief justice since 1977. The authority of the Chief Justice of the High Court is nowhere spelled out. There was an attempt by the Ministry of the Attorney General to express the authority of the chief justice in the Courts of Justice Act, as was done for the chief judges of the other courts, but it was not possible to achieve a consensus among the judges of the High Court as to what that authority should be. Section 14(3) of the Courts of Justice Act empowers the Associate Chief Justice of the High Court to exercise all the powers of the chief justice if he or she is "absent from Ontario or is for any reason unable to act". Unlike in the other courts, the sittings of the High Court and the assignment of judges are determined by all the judges of the court, under s. 14(2) of the Courts of Justice Act, "with power in the Chief Justice of the High Court to make such readjustment or reassignment as is necessary from time to time".

In addition to the chief justice, the associate chief justice and the ordinary judges of the High Court, the organization of the High Court also includes the local judges of the High Court (all of whom are also judges of the District Court) and the masters. The management of the local judges is not dealt with expressly in the statute.

The masters are under the "general supervision and direction" of the Senior Master, whose authority under s. 20(9) of the Courts of Justice Act is expressed in the same language as that of the various chief judges.

7.16 THE JUDICIAL COUNCILS

The ultimate disciplinary authority for judges is the Canadian Judicial Council, in the case of federally appointed judges, and the Ontario Judicial Council, in the case of provincially appointed judges. The former is established under the federal Judges Act, and the latter under Ontario's Courts of Justice Act. Both councils have the jurisdiction to investigate complaints of misconduct by a judge. The judicial councils may reprimand the judge privately or publicly, and may also recommend the initiation of the formal procedure to remove a judge from office. This procedure includes a public inquiry, a report to the Attorney General recommending removal from office, the tabling of the report in Parliament or the Legislative Assembly and the adoption by that legislative body of a resolution that the judge should be removed. (In the case of a District Court judge, no resolution of Parliament is necessary.) The actual removal from office is accomplished by order in council after all of the preceding steps have been taken. The only grounds for removal from office are that a judge has "become incapacitated or disabled from the due execution of his or her office"; Courts of Justice Act s. 56(1); Judges Act, s. 41(2). The Judges Act lists four reasons that would incapacitate or disable a judge from the due execution of his or her office: age or infirmity, "misconduct", failure in the due execution of office, and "having been placed, by his conduct or otherwise, in a position incompatible with the due execution of his office". Ontario's Courts of Justice Act lists only three reasons that would disable a judge from the due execution of office: infirmity, conduct that is incompatible with the execution of his or her office, and having failed to perform the duties of office.

The judicial councils are not management structures, but rather are disciplinary bodies (and, in the case of the Ontario Judicial Council, a body responsible for reviewing proposed judicial appointments).

7.17 THE NEED FOR BETTER MANAGEMENT OF THE COURTS

The order in council establishing this Inquiry proceeds from the premise that improvements are needed in the management of the court system. The research and investigations conducted in the preparation of this report and the submissions received by this Inquiry confirm that premise.

It is not the function of this report to assign marks to the current system or the performances of the people within it. Neither is it the wish of this Inquiry to assign blame for any of the system's current shortcomings or, for that matter, to give praise even where it is due.

Before leaving this topic, however, it is fitting to note that there are a great number of dedicated and industrious individuals within Ontario's court system, both on the judicial side and on the administrative side, and that they have achieved a remarkable amount in the face of constitutional, legislative and regulatory roadblocks, financial constraints, philosophical differences among participants in the system and attitudinal problems in certain quarters both within and outside the courts.

The description of Millar and Baar of court administration in Canada generally, found in Judicial Administration in Canada, is apt to the situation in Ontario:

> ...a fractured mosaic of individual fiefdoms, which has grown historically in response to immediate needs, short-term planning, political and budgetary expediencies, federal, provincial, county and municipal political structures, and from the inexpressible mores of a legal subculture bequeathed over the centuries and

> unconsciously imprinted on modern attitudes. In short, the process known in Canada as court administration is a somewhat ramshackle and outmoded conglomerate of diverse systems, the legacy of an unsophisticated social era. It is unschooled in modern management methods, lacking in modern business technology and equipment, and unalerted to the task of administering a highly complex and self-contradicting organization. Courts now face the burden of effecting large-scale organizational reforms in a relatively short period of time in order to preserve the patterns of justice at the core of their being: the day-to-day operations in the courtoom itself. [at 5-6]

The complaints about Ontario's court system are enumerated above in Chapter 4. The problems touching the management of the courts are principally those of delay, expense and inefficiency. However, even if there were no complaints about the functioning of the court system, there would still be room for recommendations in this report for the improved management of it. A court system is composed of humans and designed by humans, and so by definition there is always room for improvement.

The court system should be managed as efficiently as possible if only for the reason that the expenditure of public funds requires it. In addition, however, the court system cannot expect to escape the fiscal constraints that the government of Ontario has found it necessary to impose on all public services.

The courts must also be managed in such a way as to enable them to deal with shifting and often increasing workloads and to respond to problems as they develop. An essential component of proper management is proper information about what is going on in the system so that the system can be responsive to the needs of its customers. The available information should be sufficient to allow the managers to deal with not only the quantitative but also the qualitative. requirements of the. users of the. courts, and should allow the anticipation of future problems so that responses can be designed and implemented before the problems get out of control.

Another important aspect of efficient management of the courts is the maintenance of public confidence in the court system and the demonstration to the taxpayer that the public funds spent on the courts are money well spent.

7.18 MANAGING THE COURTS AND JUDICIAL INDEPENDENCE - THE ISSUE

Much has been written in recent years on the subject of the independence of the judiciary, especially in Canada: see William R. Lederman, "The Independence of the Judiciary" (1956), 34 Canadian Bar Review 769 and 1139; Ontario Law Reform Commission, Report on Administration of Ontario Courts, Part I (1973), 6; Jules Deschênes, Maîtres chez eux/Masters in Their Own House (1981); Perry S. Millar and Carl Baar, Judicial Administration in Canada (1981); Ian Greene, The Politics of Judicial Administration - the Ontario Case (1983), 149-182 and 259-300.

Judicial independence means many things to many people. In general terms, it could be described as the freedom of the judiciary from outside interference in discharging their essential functions. Views begin to diverge on what is the meaning of outside interference and what are the essential functions of the judiciary.

At least since 1700, when the English Parliament passed the Act of Settlement, it has been a constitutional principle of the English and later the Canadian system of government that judges should hold office free from the threat of dismissal by the executive or the legislature because of dissatisfaction with individual decisions. It has also been accepted since that time that judges could not be subject to reductions in salary as a form of disapproval of or punishment for unwelcome decisions. These aspects of judicial independence are the two basic elements of security of tenure, and no one would today suggest any diminution in the security of tenure of the judiciary.

Questions begin to arise when one considers who should have responsibility for the assignment of work to judges, the provision of financial resources for the courts (in the form of buildings and personnel) and the management of the resources that are provided to the court system.

7.19 SOME VIEWS OF JUDICIAL INDEPENDENCE

In the view of the Ontario Law Reform Commission in its 1973 Report on Administration of Ontario Courts, Part I:

> ... the function of a judge is to adjudicate, and not to administer. Clearly the government has no right to interfere with or attempt to influence in any way the adjudicative functions of a judge, whether it likes his decisions or not. Neither in our view does the government have the right to assign individual judges to hear particular cases, or the right to organize the work of the judges in such a way as to influence the course of adjudication. ...
>
> ... However, even the fullest recognition of the principle of judicial independence does not dictate that the courts must be left to operate independently of reasonable management constraints. Neither should the principle of judicial independence be used to support the misconception that the only management constraints that can be imposed on the courts are those imposed by the judges themselves, and that the only role of the government is to provide the money each year for the judges to run the system. ...
>
> ... It will be admitted readily that decisions on motions, assignment of judges to case lists, issues at trial, sentence and damages are all within the sphere of adjudication. But, equally clearly, decisions on placement and order of cases on the trial lists, the assignment of court rooms, the time of commencement of court sittings and the hiring and assignment of court reporters and clerks

> are within the sphere of administration, at least to the extent that such decisions do not adversely affect the adjudicative process. Because many adjudicative and administrative functions are interrelated, court administrative personnel will have to work very closely and maintain a special relationship with the judges, particularly the Chief Justice or Chief Judge of the respective courts.
>
> If, for example it were considered desirable to group classes of cases into separate lists for hearing (e.g., motor vehicle cases, commercial cases), this would be within the sphere of administration. But assignment of judges to hear these various groups of cases would be within the sphere of adjudication. Realistically, such a proposal would be expected to evolve out of continuing discussions between senior administrative personnel and the Chief Justice or Chief Judge, and its ongoing administration would be worked out between them so that the distinction between administration and adjudication would not be apparent to the casual observer. It is clear that the decision to group classes of cases into separate lists could not be taken without the concurrence of the Chief Justice or Chief Judge because of the interdependence of administrative and adjudicative functions. [at 8-9]

In response to the Law Reform Commission's report, the government of Ontario established a pilot project in courts administration in the area surrounding Hamilton. The project was known as the Central West Project. One of the aspects of the project was intended to be experimentation with caseflow management in the Provincial Court (Criminal Division), but this aspect of the project was a notable failure. During the course of the project, it was impossible to achieve a sufficient degree of co-operation between the Ministry of the Attorney General and the judiciary to enable various kinds of experimentation to take place. The judiciary took the view that any relinquishing of control was a threat to its independence, and that all aspects of caseflow management must rest exclusively in the hands of the judges. As a result of that experience, the

Ministry of the Attorney General published, in October, 1976, the White Paper on Courts Administration. That document pointed to the Central West Project experience as proof that a single authority had to determine all issues related to court administration:

> ... It is essential to recognize that effective case-flow management can only be achieved if those responsible for that management are responsible for, and have control over, the allocation of all resources necessary to implement case-flow control.
>
> Those responsible must not only be able to control administrative personnel and capital plant but also must be able to allocate judicial officers and through them influence the actions of such participants in the court process as lawyers, police, jurors and witnesses. ...
>
> Divided authority has not yet created problems. It is only in recent years, with the explosion of workload, that it has been necessary to exert authority over the court system by the application of modern management techniques through case-flow management. It is only in the process of attempting to institute caseflow management in Central West that the dimensions became clear of the potential conflict between the role of Attorney General as the chief litigant before the courts and the chief administrator of the courts. This potential conflict was of no consequence in the days when relatively low caseload made it unnecessary for the Attorney General to impose managerial control over the courts in order to squeeze more work out of the system. ...
>
> ... The only way to achieve any unified managerial control over caseflow is to place overall control in the hands of a central authority with the ability to develop and apply caseflow management standards upon individual courts. Neither the constitution nor the public would permit this authority to be wielded by the Attorney General. Effective management controls over individual courts and upon the court system as a whole can only be imposed where ultimate authority is vested in a judicial office. It is proposed that ultimate authority and responsibility be

> conferred upon a Judicial Council composed of the senior judiciary. [at 10-15]

Chief Justice Deschênes in his 1981 study, Maîtres chez eux/Masters in Their Own House, pp. 103-188, took a much more expansive view of what is involved in judicial independence. In the concept of "fundamental independence" of the judiciary, he included not only security of tenure, but also caseflow management and access to resources. By caseflow management, he meant the preparation of lists, the ordering of cases on the lists, the assignment of judges to cases and the allocation of courtrooms:

> These are all factors on which the integrity of the judicial process itself depends. Leave its control to outsiders, civil servants or others, and soon one will see a particular judge being assigned to a particular case for reasons irrelevant to the proper administration of justice. The independence of the judiciary requires absolutely that the judiciary and it alone manage and control the movement of cases on the trial lists and the assigning of the judges who will hear these cases. [at 124]

In access to resources, he included principally the provision of adequate personnel and the dependability of the personnel in carrying out the instructions of the judiciary.

Chief Justice Deschênes proposed that the judiciary in Canada should move gradually beyond mere fundamental independence to assume control of the power to prescribe rules of procedure governing all cases in the courts and to assume control over the budget for the courts and the personnel in the courts. At the end of the process of evolution that he proposed, Chief Justice Deschênes envisaged that the judiciary would attain true independence, under which the judiciary would present its own budget directly to the Speaker of the House of Commons (for federally appointed judges) or the Speaker of the Legislature (for provincially appointed judges) and would then attend meetings of a special legislative committee where the budget estimates would be debated. The special legislative committee's decisions would be adopted, without further change, by Parliament or the Legislature itself. The judiciary would have full authority to determine all matters concerning recruitment, promotion, education, job specifications and administrative structure of court personnel, but the personnel would remain part of the civil service for purposes of collective bargaining on working conditions, compensation and benefits.

In his 1983 Ph.D. thesis, The Politics of Judicial Administration - the Ontario Case, Professor Greene drew a distinction between judicial independence and "professional autonomy". He defined professional autonomy as "the independence which professionals tend to demand in order to satisfy their desires to maximize job satisfaction, and in order to work effectively, creatively, and comfortably" [at 149]. Professor Greene conducted a series of interviews with judges, private lawyers, crown attorneys and court administrators, and in those interviews asked the direct question of whether the principle of judicial independence includes "the right to supervise caseflow management". The responses, appearing on page 172 of his thesis, are revealing:

> Question: Do you think that the principle of judicial independence gives the judiciary the right to supervise caseflow management?

	JUDGES	LAWYERS	CROWNS	ADMINS		TOTAL	RESPONSE
N	18	7	5	4	:	34	YES
	47%	24%	17%	21%	:	30%	
N	20	22	24	15	:	81	NO
	53%	76%	83%	79%	:	70%	
	38	29	29	19	:	115	TOTAL
	100%	100%	100%	100%	:	100%	

The responses to Professor Greene's question illustrate the divergence of opinion among those who work in the court system about the meaning and essential characteristics of judicial independence. In particular, it is notable that a majority of the judges surveyed did not believe that the concept of judicial independence included a judicial role in supervising caseflow management.

7.20 THIS INQUIRY'S VIEW OF JUDICIAL INDEPENDENCE

In the debate over judicial independence, there appears to be no issue taken with the principle that judges must have security of tenure and must be free from outside interference in the decision of individual cases before the courts. There appears also to be agreement that the lists of cases should not be susceptible of manipulation by the administration so as to arrange that particular cases go before a particular judge. These principles are reflected in Part VI of the Courts of Justice Act, and this Inquiry agrees that they are fundamental to judicial independence.

Security of judicial salaries is also identified as a fundamental part of judicial independence, and this Inquiry agrees that no member of the judiciary should be subject to reduction of salary for what the government might consider to be improper or unfavourable decisions. (There has been no instance of an actual or threatened withholding or diminution of a judge's salary or benefits within living memory. Such a course of conduct by a government in this country is inconceivable, as a flagrant breach of the unwritten constitution that this country has inherited from England).

This Inquiry is of the view that one aspect of caseflow management, beyond the assignment of individual cases to individual judges, must be under judicial supervision: the total workload assigned to an individual judge over any given period of time. That is not to say that each individual judge may decide on his or her workload and the pace at which he or she will work, but rather that the setting of workloads must be done in a manner that guarantees that standards are set and the adherence to the standards is evaluated by senior judicial officers. The reason for this is that the quantity of work given to any particular judge can have a major and direct impact on the quality of the product of that judge.

In our view, this factor is the key to what is essential, in the administrative sphere, for judicial independence: the judiciary, through its senior officers, must have the power to determine standards for matters that bear directly on the essential quality of justice in individual cases. This includes the assignment of individual cases to particular judges, the assignment of the totality of a judge's workload, the setting up of particular forms of sittings in order to discharge the court's business, but nothing else. It is not essential to the quality of justice that the courts be housed in a particular way, that judges be provided with particular numbers or kinds of support staff or that judges be assured of any given level of salary or other benefits. And it is particularly not essential to the quality of justice in the courts that the judges have direction or supervision over the administrative staff, except in the areas identified by Part VI of the Courts of Justice Act and the setting of judicial workloads.

In assigning a meaning to the concept of judicial independence, and in determining the extent of the concept, it is wise to bear in mind the reason for which the concept developed in the first place. This Inquiry, like the Canadian Bar Association - Ontario in its brief, endorses the position advanced by Professor Garry Watson in his article, "The Judge and Court Administration" (1976), 5 The Canadian Judiciary 163,

> For its part, I suggest the judiciary may need to reconsider and clarify what is meant by judicial independence. While I do not think mere terminology can solve the problem, I

> personally prefer the term "an independent judiciary" over the more often used phrase, "the independence of the judiciary". The advantage of the former phrase is that it is more clearly indicative of the purpose of the concept. In the final analysis we value and stress judicial independence for what it assures to the public, not for what it grants to judges themselves. Ultimately, the sole purpose of the concept is to ensure that every citizen who comes before the court will have his case heard by a judge who is free of governmental or private pressures that may impinge upon the ability of that judge to render a fair and unbiased decision in accordance with the law. [at 183]

The approach taken to the preservation or enhancement of judicial independence should bear only this purpose in mind. In the words of the Canadian Bar Association - Ontario's brief,

> This concern [that judges should be free from government or private pressures] should not be confused with the complaint that executive control over the administration of justice will reduce judges to "mere adjudicators" with no administrative role. This does not threaten judicial independence; it speaks to what judges possibly desire (administrative control), but not ... what they need (independence). [at 15]

The fact that the essential requirements of judicial independence do not, in the view of this Inquiry, require judicial supervision of the administration of the courts does not dispose of the question whether judges should, for other reasons, assume control of the administration of the courts.

7.21 OTHER FACTORS AFFECTING WHETHER JUDGES SHOULD CONTROL COURT ADMINISTRATION

If there is no constitutional or legal principle attached to the notion of judicial independence requiring the judiciary to control the administration of the courts generally, is there any other good reason for judges to assume control of court administration?

Arguments have been made that the appearance of justice is better served by having the impartial, independent and aloof judiciary responsible for supervision of the administration of the courts, rather than the department of government that is the single biggest litigator in the courts (because the crown, through the Attorney General, prosecutes all criminal cases). If there were instances where the Ministry of the Attorney General had used or attempted to use the administration of the courts, or had even contemplated doing so, to its advantage in litigation to which it was a party, no such instances were brought to the attention of this Inquiry. There is little doubt that if such instances did exist, they would have been made known. Further, this Inquiry has seen no evidence, and does not believe, that the public feels uncomfortable with the existing situation, or that the confidence of the public in the administration of justice is at all undermined by it.

The only other reason that could be advanced for judicial control of the administration of the courts is that the system would work more efficiently as a result. There are three aspects to this argument: first, that judges would be better administrators than the civil servants now in charge of the court administration structure; second, that getting the administration of the courts out from under the control of government would free the courts from the stultifying effect of being part of an enormous bureaucracy; third, since the judiciary must be in control of some aspects of court administration anyway, it is both more rational and more efficient to centralize all aspects of control in the judiciary rather than divide them between the judiciary and the government.

There appears to be little merit to the argument that judges make better administrators. Judges are not appointed today for their administrative expertise (though administrative expertise may be a factor in the appointment to some positions, and should be an important consideration in appointments to the senior levels of the judiciary). Judges come from a diversity of backgrounds, and some of them have had administrative responsibilities before going to the bench, but their primary formation and experience have been in the practice of law rather than in management. To the extent that they have spent time on the bench, they have put their management experience behind them and concentrated on their adjudicative functions. By contrast, in the court system today there is an emerging expertise among the members of the administration in management techniques and technology that is simply not available on the judicial side.

According to Millar and Baar,

> It must also be stated that judicial administration has in large measure been dominated by the legal profession. The imprint of the legal mind and its particular discipline pervades the courts through the influence of judges, legally trained registrars exercising quasi-judicial functions, and the bar. Attorneys general departments, heavily staffed as they are with lawyers at the top and middle management levels, historically have not created the material out of which administrators are usually moulded. Indeed, legal discipline and practice tend to vitiate administrative, clerical, financial, and accounting capacities. The legal mind bears down with an intense concentration and narrow focus upon a single event, or a set of facts and issues, from an adversarial perspective. It is not by training managerial; its discipline is to analyse a single fact situation, to dismantle it into its discrete parts, and to extract therefrom inferences and conclusions. Also, under conditions of modern complexity, few sitting judges and practising lawyers have had time to master the intricacies of modern management - especially management of one of the most complex organizations known to modern society, namely the urban court. The

> effective administrator, clerk, or accountant, on the other hand, must think in terms of systems as a whole. He must assume a systems approach to his work, as opposed to an adversarial approach with its sharp but narrow focus. It is not therefore surprising that little pressure has come from the legal profession to introduce modern management techniques in the day-to-day running of the courts. [at 9]

Moving court administration out of a government ministry would not necessarily have the effect that its proponents suggest. The Ministry of the Attorney General is part of a large government bureaucracy, but it is a relatively small part of that bureaucracy, self-contained, dominated by lawyers who understand and appreciate the function of the courts and the problems that they encounter, and led by a strong and influential minister who is also a member of the legal profession. Far from being the forgotten child as a result of being within the government, our courts are probably better served by being an integral part of the ministry of a senior cabinet minister. In addition, there is no reason to expect that the substantial bureaucracy that forms our court system would become more agile or innovative under judicial control, or by dint of reporting directly to the Legislative Assembly as the Ombudsman does. Conversely, there is no reason that a court system administered as part of a government department could not reorganize and modernize its management so as to be more sensitive to the needs of both its customers and the judges and administrators working within it.

The most substantial argument advanced by the proponents of judicial control of court administration is that unified control can only be accomplished in the hands of the judiciary, and that this approach is accordingly more logical and efficient. This argument is made in the Ministry of the Attorney General's White Paper on Courts Administration. The white paper was written on the heels of the unsuccessful Central West Project, where lack of cooperation between the provincial judiciary and the administration in attempting new caseflow management techniques frustrated what began as a very promising experiment. The response to the white paper, in public and in private, was singularly unenthusiastic. In particular, editorial comments in the press condemned a proposal to transfer administration of major public resources into the hands of unelected, unaccountable members of the judicial branch of government, and insisted that only direct accountability as part of the ministry of an elected politician was acceptable.

Six years after publication of the white paper, Professor Greene's survey showed that a substantial majority of the users of, and the participants in, the court system, including a majority of judges, did not think that the notion of judicial independence required judicial supervision of caseflow management (see section 7.18 above). The responses to some other questions in Professor Greene's survey are also interesting.

Question: What do you think of the government's White Paper proposal to establish a council of Chief Judges and Chief Justices to be responsible for all aspects of the administration of Ontario courts?

	GROUP					
	JUDGES	LAWYERS	CROWNS	ADMINS	TOTAL	
N	21	9	10	6 :	46	SUPPORT
	64%	35%	48%	21% :	42%	
N	10	8	7	11 :	36	HAVE RESERVATIONS
	30%	31%	33%	38% :	33%	
N	2	9	4	12 :	27	OPPOSED
	6%	35%	19%	42% :	25%	
	33	26	21	29 :	109	TOTAL
	100%	100%	100%	100% :	100%	

[at 139]

Question: How large a part should the judges play in the supervision of clerks, reporters and court administrators?

	JUDGES	LAWYERS	CROWNS	ADMINS	TOTAL	RESPONSE
N	16	10	7	5	38	SOME SUPERVISION OUT OF COURTROOM
	52%	30%	30%	18%	35%	
N	15	16	16	23	70	NO SUPERVISION OUT OF COURTROOM
	48%	62%	70%	82%	65%	
	31	26	23	28	108	TOTAL
	100%	100%	100%	100%	100%	

[at 283]

The attitudes shown are reflected in the Canadian Bar Association - Ontario brief's recommendations:

> Recommendation 1.1:
> The judiciary retain absolute control of the assignment of judges to cases, and have the power to establish policies governing the preparation and justification of trial lists.
>
> Recommendation 1.2:
> Government retain control of day-to-day management of the courts, budgeting control and personnel procedures and control.
>
> Recommendation 1.3
> The Attorney General continue to be responsible for the courts; and the Assistant Deputy Minister (Courts Administration) should be independent of all other aspects of the department, particularly those relating to activities before the courts.

7.22 THE PARTNERSHIP APPROACH TO MANAGING THE COURTS

From the discussion in sections 7.19 and 7.20 above, it appears that neither the judiciary nor the executive can be in sole control of the courts, as each has its own sphere in which it must be the final authority in the making of decisions. This does not mean, however, that the judiciary should be excluded from input in areas for which the executive is responsible, or that the executive should be excluded from input in areas for which the judiciary is responsible. As the Ontario Law Reform Commission stated in its 1973 Report on the Administration of the Courts, Part I:

> Because many adjudicative and administrative functions are interrelated, court administrative personnel will have to work very closely and maintain a special relationship with the judges, particularly the Chief Justice or Chief Judge of the respective courts. [at 9]

This approach of a close working relationship and mutual consultation is the key to an efficient management system for operating the courts, where ultimate responsibility is divided. The importance of a co-operative spirit and of constantly open lines of communication between the judicial and administrative authorities cannot be overemphasized. As Professor Watson put it:

> ... a satisfactory solution to the problem of court administration in Canada will only be possible if we can develop a relationship of mutual trust and respect between the judiciary and the executive in court administration, and a willingness to genuinely co-operate together to develop a sound administrative system. This problem has two aspects. One is the development of an appropriate overall structure which can form an acceptable basis for mutual trust and co-operation. ... The other has to do with the attitudes of the judiciary and the executive and the way they conduct themselves in their respective roles.
>
> I suggest, on its part, the executive must convince the judiciary that its intentions are bona fide and that its sole desire is to develop a sound and efficient court administration system in the public interest. To achieve this I believe that in the area of court administration the executive need to make a special commitment to openness in government and be, and be seen to be, genuinely responsive to input from all quarters, including the judiciary. It must also make a special effort to convince everyone that it recognizes that the judicial process enjoys a very particular role in our society.

> For its part, I suggest, the judiciary may need to reconsider and clarify what is meant by judicial independence. ... [See section 7.20 above.]
>
> May I suggest that in the debate over the respective roles of the judiciary and the executive in court administration, the judiciary is really expressing two concerns, both quite valid, but it has made an error in framing them both as constitutional arguments. The first is a concern that the executive may use its power over court administration to manipulate the case assignment process to its own advantage or to otherwise influence judicial decision-making. This is clearly a problem of constitutional proportions. The second is a broader and different concern: that the executive department is attempting to construct an administrative system under which judges will be reduced to a role of simple "case deciders" and denied any meaningful input into, or responsibility for, the court's overall performance administratively. I suggest that this is an understandable and human concern of the judges but one that does not have constitutional implications. Further I would query whether it helps the argument (indeed I suggest it weakens it and confuses the debate) to put it forward as one of constitutional dimension. Yet I believe the argument is a valid one that should be listened to, despite its lack of constitutional dimension. Modern management theory and practice recognize that you cannot employ highly qualified professionals and give them roles that are devoid of any say in setting and meeting the goals of the job and expect them to be satisfied in their work. I suggest that this is one of the real reasons why judges are asking for a greater role in court administration than the executive, at times, seems prepared to accord the judiciary. I suggest that a sound co-operative model of court administration should - as a matter of sound management practice - afford the judiciary a meaningful say in the organization and operation of their work environment. [at 183-4]

The approach favoured by this Inquiry is shared responsibility for the operation of the court system, with the judiciary having the final say on matters of assignment of judges, standards for judges' workloads, assignment of individual cases and the arrangement of a sitting schedule.

The administration of all other aspects of the court system would be left in the hands of the Ministry of the Attorney General with the provincial government having final authority on certain matters. To ensure co-ordination of the efforts of the judicial and administrative sides and the constant interchange of information, a permanent courts management committee should be set up.

It is recommended that an Ontario Courts Management Committee be established, comprising the Chief Justice of Ontario, the Chief Justice of Appeal, the Chief Justice of the Superior Court, the Chief Judge of the Provincial Court, the Senior Master, the Deputy Attorney General, the Assistant Deputy Attorney General responsible for courts administration, the senior official within the Courts Administration Division of the Ministry of the Attorney General, a representative of the bar and a representative of the general public. The Chief Justice of Ontario should chair the committee. The committee should be responsible for setting operational policies for all the courts and provincial standards for the operations of the courts, subject to,

(a) the ultimate authority of the judiciary in matters relating to assignment of judges, sitting standards for judges, assignment of particular cases and the establishment of sitting schedules; and

(b) the ultimate authority of the government of Ontario in matters relating to the budget for the courts, remuneration and working conditions for provincial employees and the geographic locations in which court services are to be provided.

In matters that are within the ultimate authority of the judiciary or the government, the committee should nevertheless be actively involved in discussion of policy options and approaches at an early stage and should continue to be involved in discussions until the ultimate decision is made. In matters that are not within the ultimate authority of the government or the judiciary, the decision should be made by the committee, and the committee's decision should be supported and implemented by both judiciary and government. The committee should concern itself only with issues that require solutions at the provincial level, and should as far as possible leave local or regional issues to be decided by the local or regional authorities involved.

With the creation of the Ontario Courts Management Committee and its assumption of responsibility for Ontario court policy and provincial standards, there appears to be no role left for the Ontario Courts Advisory Committee or the Bench and Bar Council. The latter two bodies should be disbanded.

7.23 RESTRUCTURING THE ONTARIO JUDICIAL COUNCIL

The present membership of the Ontario Judicial Council is the chief judges of the Court of Appeal, High Court, District Court and each division of the Provincial Court, the head of the Law Society (the governing body of the legal profession) and two non-lawyer representatives of the public. The Senior Master is added if a complaint against a master is being investigated. With the changes proposed by this report in the structure of the courts, the Judicial Council must be reconstituted, but should continue to perform the same functions as it does now. **It is recommended that the Ontario Judicial Council be reconstituted to comprise the Chief Justice of Ontario, the Chief Justice of Appeal, the Chief Justice of the Superior Court, the Chief Judge of the Provincial Court, an Associate Chief Judge of the Provincial Court named by the Attorney General, the head of the Law Society and two representatives of the public. The Senior Master should be added for matters involving a master.**

7.24 REGIONALIZATION OF THE COURTS

At present, Ontario is divided into 48 judicial districts that rank equally with one another in the sense that each of the courts has a permanent establishment in each judicial district, with an officer in charge (registrar, sheriff, clerk, bailiff) of equal rank to those of all the other judicial districts. Each of the officers in charge in the 48 districts reports to a branch director in Toronto.

As a practical matter, it is simply impossible to have effective management of the courts, scattered over such a large province in so many individual locations, without having a regional structure. There is a need for regional supervisors who are close to the individual locations where court services are delivered and who are able to become thoroughly familiar with the problems of individual court offices.

In 1973 the Ontario Law Reform Commission recognized the need for regionalization of the courts, and proposed that the County and District Courts' eight regions form the basis for a regional organization. The reason advanced at that time was the more efficient assignment of judges from one county or district to another, in order to even out the workload of the judges. Impediments to the smoothing out of workload from one county to another have now disappeared with the passage of the Courts of Justice Act, but from a judicial standpoint the existence of regions offers the same management efficiencies as does the division of the administrative side into regions: it allows a regional judicial manager to be in better communication with the individual judges in the various centres within the region, to know where problems are developing and to respond to them quickly and sensitively. At the same time, the existence of a region with a pool of judges provides a sufficient judicial work force to allow for flexibility in deployment of the judges to deal with unexpected workload factors such as illness of a judge, cases running over their expected time and the development of backlogs. A regional structure is also more likely to be sensitive to local needs (such as the need for evening or weekend court sittings to make justice accessible to workers in a local industry or the need to schedule court sittings so as not to interfere with a hunting or fishing season).

This Inquiry considered several regional models. The Law Reform Commission report offered options of five, eight, 20 and 39 regions. Within the administration of justice today, there are six regional structures, all of them different: the District Court is divided into eight regions; the Provincial Court (Criminal Division), 11 regions; the Provincial Court (Family Division), seven regions; the Ministry of Correctional Services, five regions; the Director of Support and Custody Enforcement, six regions; the crown attorney system, nine regions. Not only are all the existing regional structures different, but also the six existing regional systems do not agree on the boundaries of any individual region, not even Metropolitan Toronto.

In attempting to design a regional structure for Ontario's courts, this Inquiry attempted to draw regional boundaries so that each proposed region would:

1. Have a sufficient volume of judicial business, judges, administrative personnel and court facilities to allow for the efficient transfer of people and cases from centre to centre to meet short term workload disparities;

2. Have a large centre within it that could operate as a regional headquarters;

3. Have geographic cohesion and be of manageable size;

4. Be of relatively equal size, in terms of judicial business and population, to the other regions;

5. Take account of trends in population and volume of judicial business.

The statistical analysis that was done in the evaluation of various regional options indicated that a structure comprising seven regions appeared to offer the best approach for the administration of justice in Ontario. See Appendix 4 for the analysis of population and caseload figures.

It is recommended that the Province of Ontario be divided into seven judicial regions, as follows:

1. **North region - Districts of Kenora, Rainy River, Thunder Bay, Cochrane, Algoma, Sudbury, Manitoulin, Timiskaming, Parry Sound and Nipissing.**

2. **East region - Counties and Regional Municipalities of Hastings, Prince Edward, Lennox and Addington, Renfrew, Frontenac, Lanark, Leeds and Grenville, Ottawa-Carleton, Stormont, Dundas and Glengarry and Prescott and Russell.**

3. **Central East region - Counties, Districts and Regional Municipalities of Northumberland, Peterborough, Haliburton, Durham, Victoria, Muskoka, Simcoe and York.**

4. **Toronto region - Municipality of Metropolitan Toronto.**

5. **Central West region - Counties and Regional Municipalities of Peel, Halton, Dufferin, Wellington, Grey and Bruce.**

6. **Central South region - Counties and Regional Municipalities of Waterloo, Brant, Hamilton-Wentworth, Haldimand-Norfolk and Niagara.**

7. **South West region - Counties of Huron, Perth, Oxford, Elgin, Middlesex, Lambton, Kent and Essex.**

For reasons of general efficiency in the administration of justice, it would be desirable to have all the courts and all of the administrative structures working within the court system organized according to the same geographic regions. As will be seen below in section 7.25 management of the courts, both judicial and administrative, is proposed to be conducted largely on a regional level, and this makes it even more important that the regional structures be the same.

Accordingly, it is recommended that the seven regions proposed above be adopted for all the courts of Ontario, the Courts Administration Division of the Ministry of the Attorney General, the crown attorney system, the Director of Support and Custody Enforcement and, if possible, all others intimately involved in the administration of justice, such as the Ministry of Correctional Services and the Ontario Provincial Police.

Poor service by the Supreme Court to centres outside Toronto, Ottawa and London has long been a complaint, and regionalization of the courts is meant in part to address that complaint. In addition, however, this Inquiry is convinced that the management efficiencies and improved service to the public offered by regionalization of all the courts make immediate regionalization desirable. Fortunately there is no need for legislation to accomplish this end in either the Provincial Court or the District Court, while legislative change proceeds to alter the structure and jurisdiction of the courts as recommended in Chapter 6. **This Inquiry recommends that the regional structures of the three divisions of the Provincial Court, the Provincial Offences Court and the District Court be modified immediately to coincide with the regions recommended above. Further, judges of the existing Supreme Court should be offered the opportunity to be assigned immediately to one of the seven**

regions.

Experience with the regional structure, or population changes or shifts in the judicial business within the regions, may indicate that the regional boundaries need to be changed from time to time. **Accordingly, it is recommended that the regional boundaries be capable of being changed by regulation, and that the suitability of the regional boundaries be examined at least every five years.**

7.25 DELIVERY OF COURT SERVICES WITHIN A REGION

Within each region, there are existing court facilities at many locations. The idea of regionalization is not to centralize all the courts at one place in a region, but rather to rationalize the delivery of court services and provide more flexibility in deployment of resources to meet short term needs. It is anticipated that under the new regional structure, the courts would continue to sit in the various locations where they sit now, subject to management decisions being made in the future to move court locations in order to deliver the service more efficiently.

Since the object of regionalization is to bring management closer to the ground level, it follows that much of the authority centred now in Toronto, both in the judicial area and in the administrative area, should devolve to each of the regions. There should be a regional head of the provincially appointed judiciary, a regional head of the federally appointed judiciary and a regional head of the Courts Administration Division of the Ministry of the Attorney General. More will be said about these new positions below in sections 7.27 and 7.35.

It is recommended that a Courts Management Committee be established for each region, comprising the regional head of the Superior Court, the regional head of the Provincial

Court, the regional head of the Courts Administration Division of the Ministry of the Attorney General, a representative of the bar and a representative of the general public. The regional head of the Superior Court should chair the committee. The committee should be responsible for actual operations of all the courts in the region, subject to the authority of the Ontario Courts Management Committee in matters of policy and provincial standards, and subject to the authority of the judiciary and the government of Ontario in the matters referred to in section 7.22.

Like the Ontario Courts Management Committee, the regional committees should engage in early discussion of options and approaches for even those matters that lie within the ultimate authority of the judiciary or the government. In matters that are not within the authority of the provincial committee, the judiciary or the government, the regional committee's decision should be supported and implemented by both judiciary and government.

Each region should have a headquarters where the regional heads of the federal and provincial judiciary and the administration should be located. In some regions, such as the East Region, the appropriate place for the regional headquarters is obvious. In others, such as the North Region, the choice is more difficult. The Ontario Courts Management Committee should decide where the regional headquarters should be. The existence of a regional headquarters should not be taken to mean that other permanent court centres should disappear, but rather there should be at least one permanent court centre in every county and district.

As it is intended that the courts should be administered on a regional basis, the region should form one judicial district and the boundaries of counties, districts and regional municipalities within the region should not form a barrier to the shifting of work from one court location to another within a region as the need arises. **It is recommended that each of the seven regions comprise a single judicial district, but that hearings continue to take place in the various existing judicial centres within a region as often as necessary to dispose of the business in that centre, and in any event at least twice a year.**

The principal goals of the proposed regional structure are efficiency and flexibility. There may be some instances where it would be more convenient for the parties, witnesses or lawyers involved in a case to have it transferred from a judicial centre in one region to a neighbouring judicial centre in another region. **This Inquiry recommends that the regional structure should be sufficiently flexible to allow for the transfer of cases from a judicial centre in one region to a neighbouring judicial centre in another region.**

7.26 THE NEED FOR MANAGEMENT OF THE JUDGES

In section 7.17 above, this Inquiry gives its reasons for recommending changes in the management of the courts. The need for efficient expenditure of public funds, especially in times of fiscal constraints, the need to deal with caseloads quickly for the benefit of the customers of the courts and the need to maintain public confidence in the system all lead to the conclusion that the judiciary itself must be well managed and working efficiently. Confidence in the judiciary and respect for its independence can only be enhanced by productivity and efficiency.

Proper personnel management is also needed in the interests of judges themselves, to enhance their job satisfaction.

7.27 WHO CAN MANAGE THE JUDGES

In the area of management of the judges, one encounters again the principle of judicial independence discussed above in sections 7.18 to 7.20. It has been said that, under the doctrine of judicial independence, no one can tell a judge what to do. This is true to the extent that no one (except a higher court) can tell a judge how to decide a case. But this Inquiry emphatically rejects the notion that no one can tell a judge when, where, how long or how often he or she must work, and in what capacities. Ontario's courts have over 400 judges operating in over 200 different locations. The management of such a vast apparatus requires a hierarchy of persons in charge who can assign work to people and places and ensure that the business of the courts is done.

In section 7.20 of this report, it is said that the assignment of workloads to the judiciary must be within the hands of the judiciary itself. Within the proposed regional structure of the courts, it would be logical for management of the judiciary in each region to be conducted by a senior judicial officer in the region. For constitutional reasons, it is necessary to have a provincial judge in charge of the other provincial judges and a federal judge in charge of the other federal judges.

The fact that an individual would have the authority to manage his or her colleagues on the bench would not prevent a management approach of consultation and consensus, but the authority to make and implement a decision must be in the hands of a senior judicial officer in each region in the interest of providing the best possible service to the public.

This Inquiry recommends that in each of the seven regions, there should be an associate chief judge of the Provincial Court and an associate chief judge of the Superior Court. The associate chief judge should have the power, which should be exercised after appropriate consultation with the bench and after discussion with the

regional Courts Management Committee, to assign judges to court locations within the region, assign individual cases to individual judges, determine the totality of workload for individual judges and determine sitting schedules.

The regional associate chief should supply leadership to the judiciary on his or her bench in the region by sitting regularly and by visiting the various regional judicial centres frequently. This would also serve to keep him or her in touch with current problems in the operation of the courts throughout the region.

Because of the leadership and management functions of the regional associate chief judge, appointments to this position should be made on the basis of superior aptitude for or demonstrated ability in judicial service and in management.

7.28 EVALUATION OF JUDICIAL PERFORMANCE

This is an extremely delicate topic. Because judges have security of tenure as part of their independence from outside interference, and because adverse comments about a judge's performance can in some circumstances be a contempt of court, regular evaluation of the performance of judges does not take place and the views of lawyers and clients who have appeared before a judge are not now sought out. In universities, however, student evaluation of professors (who also enjoy security of tenure) has become institutionalized and is regarded as a useful device. Individual judges have been known to conduct their own surveys of counsel who appeared before them. Judicial performance evaluation is common in the United States: see Farthing-Capowich, Judicial Performance Evaluation: Issues and Options.

In the interest of providing the best possible service to the public, it should be possible to devise a confidential system of evaluation of judicial performance to

be administered by the senior officers of the judiciary. This could include questionnaires to be filled out anonymously by members of the bar who have appeared before a judge. The purpose of the evaluation would be to identify the strengths and weaknesses of particular judges and to enable those judges to work on their weaknesses and enhance their strengths. These evaluations would also permit a regional associate chief judge to make best use of the judicial resources at his or her disposal for the benefit of the public.

It is recommended that the judiciary undertake a periodic, systematic evaluation of the performance of judges with a view to aiding judges to improve their performance and aiding the senior members of the judiciary in the assignment of judges.

7.29 JUDICIAL PRODUCTIVITY STANDARDS

This Inquiry received a surprising number of complaints from lawyers, administrators and members of the public about the lack of industry on the part of judges in the Provincial and District Courts. The complaints were anecdotal in nature, but they were made with sufficient frequency and vehemence that the Inquiry considered it necessary to attempt some empirical verification. To do this, we adopted the same approach as a certain Ontario cabinet minister, who made unannounced afternoon visits to court facilities. Our observations verified the complaints received, in that some Provincial and District Courts rarely sit past 3 p.m., and some of them do not sit in the afternoon at all.

In addition, such statistical information as is available (which covers only the Provincial Court) indicates that the average sitting day for provincial judges is only three hours - and this does not include days on which a judge is not scheduled to sit, but rather comprises only the days on which sittings are actually scheduled.

This Inquiry recognizes at once that judges do much more than merely sit in court, and in some courts judges do a great deal of travelling to reach court locations, but an average sitting day of only three hours is unacceptably low. It is to be contrasted with the target set for the judges of the Supreme Court of British Columbia - a target that is realized routinely and exceeded frequently - of four and a half sitting hours per day, in addition to whatever work a judge does in his or her office. The four and a half or five hour sitting day appears to be a standard for most of the courts across Canada, for both federal and provincial judges.

In England, the existing target for the circuit judges (roughly equivalent to our District Court judges) is five hours in addition to their chambers work, and the Lord Chancellor's department has recently proposed that the target be increased to six sitting hours. Further, the Lord Chancellor's department has proposed that the number of sitting days for circuit judges should be 210 per year, which equates to 44 sitting weeks less ten statutory holidays.

The purpose of setting targets for judicial sitting times is, it must be remembered, the most efficient use of resources within the court system so as to provide the best possible service to the public, and particularly to enable the public to have access to the courts within a reasonable time.

In determining what appear to be appropriate sitting standards for the various courts, this Inquiry has begun with the proposition that an average day should have a minimum of seven hours of work. We then took into consideration the fact that preparation by a judge for a case in some courts involves the reading of more materials than in others, that some courts are specialist courts and others are generalist, that some courts engage extensively in pre-trial conferences and conferences during the course of a hearing, that some courts must prepare extensively for instruction of a jury on the law and the evidence in a case, and that some courts are required to produce more written reasons for decision than are other courts. For the purpose of sitting times, pre-trial conferences and other conferences with counsel and their clients should be counted as sitting hours.

This Inquiry recommends that the sitting year for a judge should consist of 44 weeks including judgment weeks and judicial training courses approved by the regional associate chief judge. Judges should be given judgment weeks when needed for writing the reasons in their reserved decisions. The general standard for judgment weeks in the new Supreme Court of Ontario, which will be responsible for extensive research and writing in cases important for development of the law, should be every second week. For the new Court of Appeal, the standard should be one week in three. For the Superior Court, judgment weeks should be scheduled every fourth week. In the Provincial Court, judges should receive judgment weeks as required, on application to the regional associate chief judge. **The normal sitting day for an appellate court judge should be four hours; for a Superior Court judge, four and a half hours; for a Provincial Court judge, five hours; for a justice of the peace, six hours.**

These standards are proposed as norms: it is recognized that they will not always be reached, for reasons beyond anyone's control, such as last minute settlements or illness of witnesses; and sometimes they will be exceeded. The purpose of these standards is to ensure that the courts' work gets done and to distribute the workload as equitably as possible among all of the judiciary, recognizing at once that some have regularly been bearing more than their fair share of the burden, while others have not been as

basis.

7.32 SITTINGS AND SCHEDULING GENERALLY

In Ontario the High Court has always been an itinerant court with judges centred in Toronto. The new Superior Court, although regionalized, will begin with a large number of incumbent High Court judges residing in Toronto and will retain an itinerant quality for some time. However, as stated in section 6.20 above, it is not intended that the rotation of judges be continued as it exists today. **This Inquiry recommends that the judges of the Superior Court should be rotated only to the extent necessary to ensure a measure of variety of experience for any particular judge and to expose each community to a variety of judges.**

In contrast to the High Court, the Provincial Court has always functioned as a local court, though in recent years there has been increasing rotation of judges from centre to centre. With the fusion of the existing divisions of the Provincial Court into one unified court and the addition of new lines of work to its jurisdiction, rotation among areas of the law can serve to provide variety to the judges of the new court. The high volume of cases in the Provincial Court will make it less necessary to move judges from one centre to another to keep them busy. However, in the one and two judge areas of the province, efforts should be made to provide variety for a judge and for those appearing in the courts. **It is recommended that judges of the Provincial Court be rotated from centre to centre for the same purposes as those of the Superior Court, though rotation may be expected in the Superior Court to a greater extent, at least initially.**

At present, all three divisions of the Provincial Court sit on a year round basis, although the level of activity diminishes during the months of July and August because judges, lawyers, parties and witnesses often take vacations during those months. However, in the Supreme and District Courts, the concept of the "long vacation" and the "short vacation" remains, as rule 3.03 of the Supreme and District Courts' Rules of Civil Procedure prohibits the trial of actions in July and August and from December 24 to January 6 unless all parties consent or the court makes a special order for a trial during those times. It is rare for trials to take place in the Supreme and District Courts during July and August or between December 24 and January 6, but in the Provincial Court it is business as usual during these periods. Although it is common for people to be on vacation in these periods, this is not universally the case and the rules of our courts should not proceed on the assumption that only extraordinary business can be done at a particular time of year. With proper planning and scheduling, there is no reason that the regular business of the courts cannot take place throughout the year. The recommendation in section 7.40 concerning fixed hearing dates should assist greatly in the avoidance of inconvenience.

It is recommended that all courts conduct all lines of business, with the possible exception of jury trials, throughout the year, while making appropriate accommodations for the convenience of parties, witnesses and counsel.

From the standpoint of efficiency, it is most useful that judges be assigned to sit in teams of at least two. This permits one judge to pick up cases from the other or others in order to even out workloads and dispose of the day's lists most efficiently. It also permits one judge to pre-try a case and send on the remaining issues for immediate hearing by another judge sitting that same day. **It is recommended that where the workload warrants it, judges be assigned to sit as often as possible in teams.**

7.33 CONVENIENCE OF WITNESSES AND JURORS

Most of the briefs and submissions received by this

Inquiry from non-lawyers, and a good many of those received from within the legal profession, comment on the problems that witnesses encounter in the justice system. They do not receive adequate advance warning of when their attendance will be required, or conversely, when their attendance will not be required because of an adjournment. They are inadequately compensated for their time lost from employment. When they arrive at the court building, they do not know where to go and there is no one for them to talk to and nothing for them to read to give them an idea of what is going to transpire. In summary, perhaps the most important persons in the trial process receive the worst treatment at the hands of the justice system. The maintenance of public confidence in the administration of justice requires that witnesses be better treated, particularly in the criminal courts, where the greatest problems appear to exist.

This Inquiry recommends that the summonses served on witnesses should be written in clear, plain English and should give adequate instructions to the witness concerning exactly where and when his or her attendance will actually be required. Witnesses whose attendance at the court causes them economic loss should be provided with real compensation (though not necessarily a complete indemnity). Scheduling and notification practices should be improved so that witnesses are given sufficient advance warning of when their attendance will be required, and when an adjournment is expected.

Sheriffs, administrators and members of the public have all commented on the needless waste of money by the system and the inconvenience and economic loss caused to prospective jurors when jury panels are summoned and kept waiting at a courthouse, only to be sent home and told to return later, or told that no jury is required at all. This happens with some frequency, sometimes as a result of poor scheduling of cases, but sometimes as a result of last minute pleas of guilty or settlements that could not have reasonably been predicted. While improved scheduling of cases will solve some of the problems, measures should be adopted to dispense with the unnecessary attendance of jurors at the courthouse. **It is recommended that an experiment be tried with the summoning of jurors to hold themselves ready to attend at the courthouse on receipt of a telephone call from the sheriff's office on the day before they are actually required, without the necessity of attending at the courthouse unless and until a jury is to be selected.**

If the experiment proves successful it should be possible to provide a more realistic level of compensation for jurors who are actually called to the courthouse.

7.34 JUDICIAL SERVICE IN THE FRENCH LANGUAGE

It has been brought to the attention of this Inquiry that in several centres in Ontario where a substantial French speaking population exists and a number of francophone lawyers practise law, there is no French speaking judiciary available on short notice in one or more of the courts. In some cases, a case is put on the hearing list for hearing in French and a non-French speaking judge is assigned to hear the case. This occurs despite the declaration in s. 135 of the Courts of Justice Act that English and French are both official languages of the courts of Ontario. The problem must not be allowed to continue.

This Inquiry recommends that appointments and assignments of French speaking members of the judiciary (including masters) should be made so that there is someone available on short notice in areas with a significant francophone population, and someone available on reasonable notice in the rest of the province, to hear motions as well as trials and applications in the French language.

7.35 MANAGEMENT OF THE ADMINISTRATION IN THE REGIONS

Regionalization of the courts necessarily entails regionalization of the administration. This affords the opportunity to restructure the management of the administrative side of the courts generally. The description of the existing administrative structures in sections 7.3 to 7.10 above indicates that there is a lack of co-ordination at the field level of the operations of the various courts. In effect, each of the existing courts is regarded as almost a watertight compartment for administrative purposes, right up to and including the Toronto branch head to whom the administrative officer in charge of a court location in any of the existing 48 judicial districts reports. It is hard to understand why five courts - Provincial Court (Civil Division), Provincial Court (Family Division), Provincial Court (Criminal Division), District Court and Supreme Court - all operating in the same or nearby field locations, all requiring the same physical facilities, all requiring the same support services such as courtroom clerks and reporters and all requiring the same kind of administration, are separately administered with separate staffs and separate supervisors centred in Toronto. Other provinces with advanced court management systems, such as British Columbia, Alberta and Quebec, have integrated the management of all their courts at the field level and at the head office level. Integrated management would provide better co-ordination and use of existing facilities, more efficient deployment of resources in the various courts as need requires and a more coherent approach to solving the various problems with which the justice system must deal in delivering service to the public.

It is recommended that management of the administration of all the courts in Ontario be integrated at the field level and at the head office level. This would mean that in each region, there would be a regional courts manager in

charge of the administration of all courts operating in the region.

Regionalization and integration of the administration of the courts also provide an opportunity to rationalize the structures of the courts. It is not apparent, for example, why there should be a sheriff in every county, rather than a sheriff in busy court locations and a deputy in the less busy locations. It is equally unclear why there must be a clerk or registrar in every court location, rather than a clerk or registrar in busy locations and a deputy in the less busy locations. There is no logical reason why the person in charge of an office with a low level of business and a small number of employees should necessarily have the same rank and remuneration as an officer in charge of a busier location with many employees. There is also no reason why court offices in small centres cannot be combined, as is done in some locations of the Provincial Court (Criminal Division) and (Family Division), so that a single supervisor would be in charge of an office offering the services of all courts.

It is recommended that the administration of the courts of Ontario be integrated and rationalized so as to deliver service to the public in any manner that provides efficient service and that statutory requirements that there be a sheriff, registrar, clerk or other officer in particular locations should be repealed.

In particular, with the integration of the administrative structures of the various courts, there appears to be no functional reason for maintaining separate offices of sheriff (for the service of process and enforcement of orders of the Superior Court) and bailiff of the Provincial Court (Civil Division) (who performs the same functions for that court). This is especially so since the various divisions of the Provincial Court are to be integrated as well. **This Inquiry recommends that the office**

of bailiff of the Provincial Court (Civil Division) be abolished and its functions assumed by the office of sheriff. Existing appointments of bailiffs should be terminated on reasonable notice, and arrangements should be made to engage such of the former bailiffs as are needed in appropriate positions in the sheriffs' offices.

In section 11.9 below, the integration of court reporting services is discussed. **It is recommended that the provision of court reporting services to all the courts be integrated within the Courts Administration Division of the Ministry of the Attorney General, and that reporting services be provided locally within each region as required.**

7.36 RESPONSIBILITIES OF THE SHERIFF

Two issues have been brought to the attention of this Inquiry concerning the responsibilities of the sheriff; first, whether those responsibilities should be diminished by allocating some of them to the police; second, the adequacy of the sheriffs' resources to discharge their responsibilities.

The responsibility for the provision of courthouse security is a matter of continuing debate. In 1978, the Pukacz Report recommended that "the Ontario Government Protective Services administered by the Ontario Provincial Police be designated to provide" court security officers, information officers and attendants for all courts, and that where police officers were performing these functions, they should be replaced by the protective service or by "specially trained uniformed civilian staff" in the smaller centres. The police were to "supplement and strengthen security in the courts whenever required" if they were present in court, and to institute "special security arrangements whenever dangerous prisoners or a large number of prisoners have been brought for trial or where threats, violence, disturbances, etc. are likely to occur" [at 11, 33-39].

Sheriffs have specific responsibilities imposed by the Sheriffs Act for the provision of security in the courts:

> 16. The sheriff shall give his attendance upon the judges for the maintenance of good order in Her Majesty's courts, and for the doing and executing of all other things that appertain to the office of sheriff in such case.
>
> 17. The sheriff has the appointment and control of the constables at the sittings of the High Court, the [District Court], and other courts at which the attendance of the sheriff is required.

By the same token, under the Police Act, s.57, police forces have a general responsibility for keeping the peace.

Whatever may once have been the situation, the office of sheriff in Ontario is no longer equipped to provide physical security for the participants in court cases. Sheriffs' officers do not receive the same kind of training in crowd management or defusing or dealing with violent situations as do the police, and they encounter such situations so infrequently that it is unrealistic to suggest that they should receive such training or that, if they received it, they would be able to respond appropriately. Several violent incidents have occurred in Toronto courtrooms and courthouses in the past few years. In addition, the potential exists, particularly in family and criminal courts, for difficult situations to occur that require an immediate response by someone whose authority will be recognized and respected and whose training and experience permit a swift and appropriate response. The practicalities of the need for courthouse security call for the provision of security by a police force.

Municipal police forces are under municipal direction and have their budgets, staffing and training set by municipal authorities. If municipal police forces are employed in the provision of courthouse security, appropriate arrangements must be negotiated with the municipal police forces to assure the provision of the right kind of service and the availability of that service as required by the courts. These factors tend to suggest that a provincial force should be responsible for the provision of courthouse security generally.

This Inquiry recommends that the provision of court security should be the responsibility of a provincial police force operating at the direction of the Courts Administration Division of the Ministry of the Attorney General. To the extent that use of municipal police forces is considered desirable, appropriate arrangements should be made with the municipal authorities involved and adequate funding should be provided for that purpose.

A similar issue arises in connection with the execution of civil process of the courts requiring the arrest and detention of a person. This arises principally in the carrying out of arrest warrants and warrants of committal for contempt of court, especially in the area of family law. An arrest, by its very nature, requires the physical confinement of the individual and almost always gives rise this Inquiry, this comes squarely within the mandate of a police force to keep the peace. It is not possible to predict in advance which arrests will be peaceful and which will not. It is impractical to suggest that the sheriffs have primary responsibility for civil arrests with the ability to call on the police only if resistance is incurred on an initial attempt. As the carrying out of arrest and committal warrants under civil process is a part of the enforcement of civil judgments, an area for which the sheriffs have general responsibility in the administration of justice, it would be appropriate for them to have a supervisory role over the police in this area, but the police should be responsible for the physical execution of the warrant. **It is recommended that the police should be**

responsible for physical execution of civil arrest and committal warrants, at the direction of the sheriff, and that appropriate financial arrangements be made with the municipal police forces for the carrying out of these functions.

Another problem area for sheriffs is the enforcement of orders and writs requiring the delivering up of possession of goods or premises. Sometimes resistance is encountered or can reasonably be expected to be encountered by the sheriff. At present, the sheriff calls on the police for assistance when resistance is apprehended, but the response of the police is not uniform. **It is recommended that the sheriffs continue to have primary responsibility for the enforcement of all other civil process, including orders and writs that require the delivering up of possession of goods or premises, but that the police should have a clear duty to respond to the call of the sheriff for assistance whenever the sheriff has reason to believe that resistance may be offered.**

If the recommendations above in this section are adopted, a substantial degree of relief will be provided to the sheriffs in the carrying out of their more difficult duties. Nevertheless, it is a common complaint of both sheriffs and lawyers that the office of sheriff is not adequately staffed to provide satisfactory service in such matters as service of process and searches for writs of execution. **It is recommended that the sheriffs be provided with adequate personnel to provide prompt, efficient service to the public in those areas remaining within the responsibility of the sheriff.**

7.37 ROLE OF OFFICIAL EXAMINERS

The existing situation of the official examiners is described in section 7.9 above. The Supreme and District Courts' Rules of Civil Procedure, adopted in 1984, took away from the official examiners their former monopoly on the holding of out of court examinations of witnesses and parties in civil litigation. However, use of a reporter other than an official examiner's reporter requires the consent of all parties involved in the examination.

In 1987 the Ministry of the Attorney General took the position that it would no longer appoint official examiners in the private sector, but would confine the appointments in the future to registrars only. This will mean that in those centres where there are private sector official examiners, someone will have to take up the slack as the private examiners retire or die and are not replaced. At some point, in order to ensure that there is sufficient access to out of court examinations, the government will have to begin providing the service through registrars or the Rules Committee of the Supreme and District Courts will have to amend the rules to remove the requirement of consent of the parties for use of a reporter not attached to an official examiner.

7.38 THE NEED FOR CASEFLOW MANAGEMENT

Caseflow management by the courts as it exists in Ontario today consists of pre-trial conference procedures, and in the Supreme and District Courts, status hearings under Rule 48 of the Rules of Civil Procedure and references to family law commissioners in family law cases heard at Toronto or Ottawa. These measures are relatively recent innovations, at least in this province. They exist largely as an expedient response to pressures of caseloads.

There has recently been some considerable resistance on the part of the bar and the bench to the status hearing procedure in the Supreme and District Courts, and there has not been general recognition of the legitimate interest of a court as an institution in the control of the flow of cases before it.

The provision of court services is an extremely expensive enterprise. Although the users of the civil courts pay fees for most steps along the way in a proceeding, those fees do not begin to cover the total cost of the operation. Cases that take longer to go through the courts generate more business for the courts along the way, as they give rise to more procedural motions, more and longer pre-trial conferences and longer hearings if that stage is eventually reached. The cost of storage of documents in a case that drags on for years is a burden on the taxpayer. The cost of a slow moving case to the system, and accordingly to the public, is a sufficient reason in the view of this Inquiry for the judiciary, as guardians of the public interest, to step in and manage the flow of cases through the system. The judiciary must be the ones to undertake caseflow management because the measures available to prod slow moving cases into a faster pace all take the form of orders of the court setting appropriate time periods, with the ultimate sanction being dismissal of a case or the striking out of a defence.

There is a second public interest in need of protection in the flow of cases through the court, though the "public" involved is not the entire taxpaying public whose interest is affected by the cost of the system generally. Just as a slow moving case costs the system money by generating more and longer motions, pre-trial conferences and hearings, so it costs the litigants in each such case more money in lawyers' fees. Research in the United States indicates that court management of caseflow saves clients a significant amount of money (see Attacking Litigation Costs and Delay, American Bar Association, 1984). Lawyers cannot always be relied on by themselves to move cases along quickly, engage in early settlement discussions or take other measures designed to save the client's money in the progress of a case through the courts.

In its 1973 Report on Administration of Ontario Courts, Part I, the Ontario Law Reform Commission said:

> In our view this traditional approach to civil litigation [of leaving to counsel all decisions as to whether and when a case proceeds to a final resolution] has been one of the major contributing factors to delays in the court system. While on occasion there are good reasons for delay, we believe that the Courts generally should have the right to intervene in the management of the flow of civil litigation coming before them to ensure in the public interest that cases are properly and speedily brought to trial. If management of litigation is left to the lawyers alone, the adversary system occasionally puts them in conflict with the public interest, for delays and procrastination may in certain cases be in the best interests of their private clients. [at 13]

The family courts most often deal with issues relating to the protection and welfare of children, which are social issues that again merit speedy attention in the interest of not only the parties, but of society as well.

7.39 CASEFLOW MANAGEMENT VERSUS CASE MANAGEMENT

In the United States, it is common for cases to be assigned to a judge immediately after the initial filing with the court. The purpose of this assignment is to put a judge "in charge" of the case from the very beginning to deal with all procedural aspects of the case, including timetabling, motions and any special directions needed to prepare the case for trial, and eventually to hear the trial itself. This involvement in a case from beginning to end is case management, and proceeds from the premise that the public interest (and perhaps the parties' interest) requires supervision of each individual case as it proceeds through every step. This Inquiry is not convinced that such intensive involvement in the processing of cases is required in Ontario. We prefer the approach of caseflow management, in which the court becomes involved in the general picture of the movement of cases through the court and intervenes in individual cases when delays have reached unacceptable levels or procedural complexities require untangling in order to permit the case to proceed.

The question of what delay is unacceptable is one susceptible of much discussion. In criminal cases, for example, suggestions have been made that a trial should take place no more than three months or six months after the laying of the information. In civil cases in the Supreme and District Courts, rule 48.14 of the Rules of Civil Procedure originally provided that a case that had not been set down for trial within one year after the filing of a statement of defence should be scheduled for a status hearing by a judge; that rule was amended in 1987 to change the one year period to two years.

On the procedural disentanglement front, rule 37.15 of the Supreme and District Court Rules of Civil Procedure provides for the designation of a judge to hear all motions in a proceeding involving complicated issues or in two or more cases involving similar issues. This rule is commonly known as the Mississauga disaster rule, because its utility was demonstrated in the multitudinous law suits arising out of the Mississauga train derailment that required the evacuation of many thousands of people. In a similar vein are the rules of the Unified Family Court and Provincial Court (Family Division) that permit the seeking of directions in any matter.

This Inquiry considers that case management on the American model is not necessary in Ontario, and to a great extent it is not practical because it supposes the ready availability at all times of a particular judge to deal with motions. There are also some undesirable aspects of case management by a single judge, particularly in cases where there may be a number of interim measures sought, as a judge can become too familiar with a case, a party or a solicitor over the course of time.

This Inquiry recommends that the Ontario Courts Management Committee, after consultation with the bar and the public, should set targets for the time period within which the average case (in each line of business coming before the courts) should be completed. The standards should be well publicized. The standards should be applied, in a flexible fashion, in the utilization of caseflow management techniques. Those techniques should include status hearings for civil and family cases, pre-trial conferences, motions for directions and the assignment of a judge to dispose of all motions in complex or interrelated cases.

7.40 THE NEED FOR MANAGEMENT INFORMATION

The disussion of caseflow management techniques and the recommendation concerning them that appear above make it clear that there is a need to know what cases are in the court system and how quickly they are proceeding. This kind of information is needed for other purposes as well, such as scheduling of sittings, assignment of judges and provision of court accommodation and personnel. The number, nature and size of cases in the system are also vital information required for such purposes as assessing the impact of changes in the jurisdiction of the courts. An example is the change made in the 1984 Courts of Justice Act to divert certain appeals from the Court of Appeal to the Divisional Court. Only the roughest of measures of the prospective impact of that change were obtainable, and those were available only by doing a manual search of the appeals pending in the Court of Appeal office for what was deemed to be an appropriate period of time. In order to discover what the nature and size of cases in the District Court system were, this Inquiry had to engage in a similar manual search of District Court offices and the same was true in trying to determine what was the cost of litigation in the District Court; see Appendices 3 and 4. The management of the courts under the proposed integrated, regional system in this report makes it essential that adequate management information be readily obtainable about what cases are where, how old they are and how many there are of each kind. Scheduling of cases also requires sophisticated information systems, particularly if it is desired to have the courts operating at maximum efficiency and to minimize the down time of judges and courtrooms. At the very least, the government and the judiciary need to have ready access to much more information than is available today. The use of computers would be of great benefit.

It is recommended that a sophisticated, computerized management information system be installed in the courts of Ontario to provide ready access to at least the following information: number, nature and size of cases commenced; progress of cases through each major step; adjournment rates; number and type of dispositions; elections in criminal cases; sitting hours and days available at each location for each court; actual sitting hours and days at each location for each court; judges' sitting schedules and actual sitting times, broken down by type of case; average hearing times for each type of case in each court. The information should be readily accessible in each major court centre for all the centres of the province.

7.41 THE MANAGEMENT INFORMATION SYSTEM AND THE SHERIFFS' OFFICES

If a sophisticated, computerized management information system is in place in all the major court centres, and only if that is the case, it becomes possible to modernize the existing enforcement of judgment debts system.

For a general discussion of the existing system and its numerous and serious deficiencies, see the Ontario Law

Reform Commission's Report on the Enforcement of Judgment Debts and Related Matters. For the purposes of this Inquiry, it suffices to say that in the 1980's, with the technology available, it is simply unacceptable for a judgment creditor to have to file a piece of paper in 48 different sheriffs' offices in order to enforce a judgment across the entire province. To put it another way, the courts' enforcement process should no longer run only to a county boundary in a technological society capable of sending words and images instantaneously around the globe, a society whose population (and assets) are highly mobile. The sheriffs system is the only one left in the administration of justice where county boundaries are, in effect, borders.

In the regional structure for the courts proposed in section 7.24 above, it is recomended that the province be divided into seven judicial regions, each one of which would form a single judicial district. For the purposes of enforcement of judgments, this Inquiry goes further. **It is recommended that court judgments should be enforceable throughout Ontario on the filing of the appropriate material in any permanent court centre, and that the management information system in use in the courts should include a computerized system to make this possible.**

The costs of litigating a civil case down to judgment are already too high. We should no longer countenance a costly, unwieldy and inefficient enforcement system on top of the already expensive litigation process.

7.42 CASE SCHEDULING

The scheduling of cases for trial or hearing is a particular sore point with the bar, one that has come up in almost all of the submissions filed by individuals and associations within the profession of law.

In respect of civil cases in the Supreme and District

Courts, and to a lesser extent criminal cases in those courts, the submissions all seek the institution of a fixed trial date system. In many District Court centres, including the busiest one at Toronto, a fixed trial date system already exists. The same is true in all three divisions of the Provincial Court. This is also the case in all the courts of Quebec, Alberta and British Columbia, which are the three next largest provinces after Ontario.

Nothing could be more convenient for the bar, clients and witnesses than to know exactly when a case will proceed to a hearing. All will know when they have to be available, when they have to have all preliminary steps completed and when they have to make their final preparations for hearing. Under the existing Supreme Court system (and in some cases, in the District Court as well), all cases that have been set down for trial are placed in order on a ready list and it is the responsibility of the lawyers for the parties to watch the list to see when their case is likely to be reached. In smaller centres where the court sits only a few weeks each year, it becomes a guessing game whether a case will be reached in the spring, the fall, or the following spring. Even in the larger centres, there is a high degree of uncertainty about how soon a case will near the top of the list, and cases can come up to the top with sometimes terrifying speed as the cases ahead of it settle. As the Canadian Bar Association - Ontario brief puts it:

> It is impossible to explain to parties and to witnesses why a case that takes years to get to trial can then be called on virtually no notice. Under our present system, parties, witnesses, and counsel must hold themselves in a state of readiness to be called for trial over an indefinite period of hours, days, weeks, and sometimes months. The result is extreme inconvenience to all involved, and a great waste of time and money as witnesses and counsel rearrange schedules, make travel arrangements, and prepare to be called to court on one day - only to find they are not in fact reached for several weeks or not reached during the sittings at all. Not only is the

> present system extremely inefficient and wasteful, it detracts significantly from the public perception of a properly-run judicial system. [ch. 3, at 18]

In Alberta, British Columbia and Quebec, fixed trial dates in civil cases are assigned on request immediately after the close of pleadings. Trial co-ordinators obtain estimates of trial time required from counsel on the case and also apply their own knowledge and experience in determining how many cases to book on a particular day. A judicious use is made of overbooking to allow for the prospect of settlements. The Supreme Court of British Columbia is currently overbooking by a factor of three in an effort to clear up a backlog, after which time the overbooking factor will be two or two and a half. In the rare event that a case cannot be reached on a fixed trial date, the chief justice assigns a second, guaranteed trial date within a couple of weeks after the first one, and sometimes the case is disposed of on the following day.

Experienced trial co-ordinators are the key to the success of this process, but a further very useful technique is the pre-trial conference. At a pre-trial conference, a judge can nail down more accurately the required trial time based on the estimates of counsel present at the conference and on his or her own experience in trying cases.

If the courts are computerized as recommended in section 7.39 above, the scheduling of fixed dates becomes even easier and more efficient, as the computer can scan the schedules of all courts in a region to ensure that there are no conflicts for counsel (or even witnesses - in Vancouver, the Provincial Court computer is programmed with the vacation schedules of the city police).

A further complaint of the legal profession regarding trial dates, even in the Provincial Court where fixed trial dates are the norm, is that long trials are sometimes split into one or two day chunks and heard over a progression of weeks or months. This is costly and inefficient, because repeated attendances at the court are required and because each time a case resumes it is necessary to recapitulate to some extent what has gone before. Efficient scheduling should not require the splitting up of a trial unless counsel have seriously underestimated a case, but even in those instances it should be possible through the proper pooling of judicial resources to alleviate the problem at least to the extent of being able to dispose of the case in two bites.

This Inquiry recommends that all trial courts and all appeal courts adopt a fixed date scheduling system, making use of professional trial co-ordinators who apply overbooking principles to ensure that judges and courtrooms are kept busy. To the extent that a case cannot be reached, it should be guaranteed a hearing date promptly after the initial one. Long hearings should not be split, but where this is unavoidable, they should not be split into more than two segments and every effort should be made to ensure that the judge who commences a case is immediately made available to complete it.

7.43 USE OF TECHNOLOGY FOR ROUTINE COURT APPEARANCES

In the Supreme and District Courts, rule 37.12 of the Rules of Civil Procedure permits the hearing of contested motions by conference telephone call, by agreement of the parties and the presiding judge or master. The use of this rule is not restricted to minor or routine matters. It has now become regular practice for the Supreme Court of Canada to hear motions for leave to appeal to that court by means of satellite television links. Against this backdrop, it appears there is ample scope for the increased use of technology in routine court appearances such as the first appearance in criminal or family court where no disposition is to take place and also in pre-trial conferences. The savings to the parties and the state would be considerable if it was not necessary for a party or lawyer to go to the courthouse and if the matters could be dealt with in a judge's office rather than occupying a courtroom.

This Inquiry recommends that the Courts Management Committees explore the use of closed circuit or satellite television and conference telephone links for first appearances in criminal and family court and for pre-trial conferences in all courts. The Attorney General should seek an amendment to the Criminal Code to make this possible.

7.44 THE NEED FOR EVALUATION AND EXPERIMENTATION

It is a common theme throughout this report that our courts have clung to old structures and procedures long after the conditions on which they were based had disappeared and long after they were no longer useful or suitable for current conditions. The same may well happen in respect of the measures recommended by this report if the administration and the judiciary are not ever watchful to see how the system is working, what has changed within and outside it, and what can be done to improve its efficiency and responsiveness.

The authors of In Search of Excellence, whose subtitle is "Lessons from America's Best-Run Companies", offer the following advice to all large institutions:

> "Do it, fix it, try it," is our favourite axiom. Karl Weick adds that "chaotic action is preferable to orderly inaction." "Don't just stand there, do something" is of the same ilk. Getting on with it, especially in the face of complexity, does simply come down to trying something. Learning and progress accrue only when there is something to learn from, and the something, the stuff of learning and progress, is any completed action. The process of managing this can best be thought of in terms of the experiment and, on a more pervasive basis, the experimenting process.

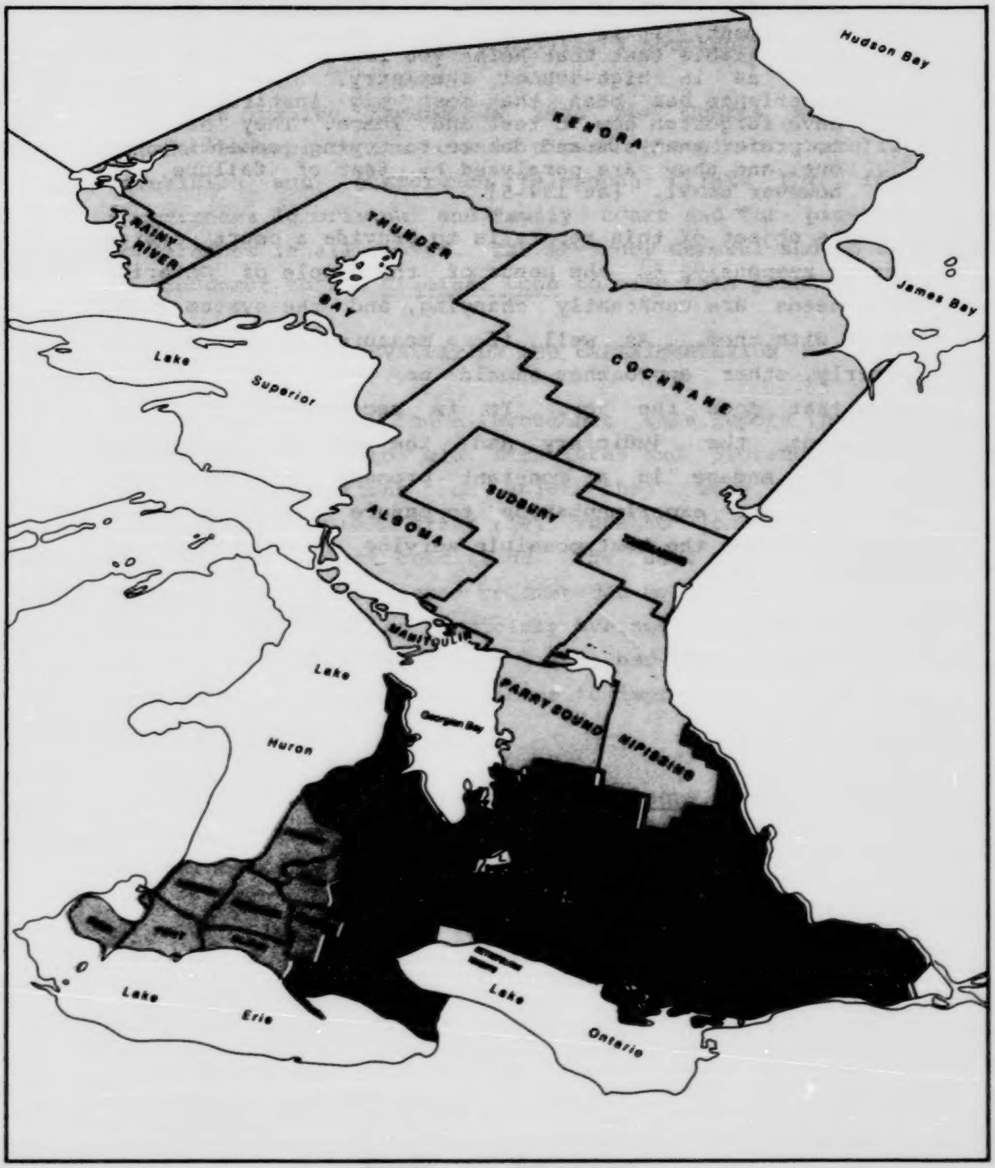
> The most important and visible outcropping of the action bias in the excellent companies is their willingness to try things out, to experiment. There is absolutely no magic in the experiment. It is simply a tiny completed action, a manageable test that helps you learn something, just as in high-school chemistry. But our experience has been that most big institutions have forgotten how to test and learn. They seem to prefer analysis and debate to trying something out, and they are paralyzed by fear of failure, however small. [at 134-5]

The object of this report is to provide a court system that is responsive to the needs of the people of Ontario. Those needs are constantly changing, and the system must change with them. As well, if a measure is not working properly, other approaches should be tried until one is found that does the job. **It is recommended that the government, the judiciary and the Courts Management Committees engage in a constant process of evaluation, innovation and experimentation to ensure that the court system provides the best possible service to the people of Ontario.**

TABLE 5

PROVINCE OF ONTARIO

PROPOSED JUDICIAL REGIONS


Hudson Bay
KENORA
RAINY RIVER
THUNDER BAY
James Bay
COCHRANE
Lake Superior
SUDBURY
ALGOMA
MANITOULIN
Lake Huron
Georgian Bay
PARRY SOUND
NIPISSING
Lake Erie
Lake Ontario

REGION		POPULATION
North	▨	731,000
East	■	1,258,000
Central East	■	1,142,000
Toronto	□	2,155,000
Central West	■	1,134,000
Central South	■	1,307,000
Southwest	▨	1,157,000

CHAPTER 8

The Process of the Courts

8.1 INTRODUCTION

This Inquiry regards as its principal task the design of a new court structure and the management of that structure. In the course of this Inquiry, however, it became obvious that even the present court system is not used in such a way as to conserve its resources. Even a better designed and managed system could not long endure wasteful use.

In recent times, there has emerged a disturbing tendency towards very long proceedings, at both trial and appellate levels. The justice system, like many other systems, is finite and must be used with care.

In this chapter, we deal with a number of matters which will improve the efficiency of the courts. There is an eclectic quality to what follows for two reasons. Firstly, the matters in this chapter do not represent the results of an encyclopaedic study. The matters dealt with are those that we encountered in our inquiry into the structure of the courts. Some of the matters that follow were drawn to our attention in the submissions received, others flowed from our own observations. We are aware that some of the matters which follow may be further studied by others. For example, the proposed Canadian Judicial Centre may undertake a study of the trial process and how it can be shortened.

Secondly, the justice system is a complicated machine. There is no quick fix or magic formula whereby it can be made to work better. What follows is a number of modifications that can be made to a variety of procedures in the courts, even as reorganized, and a few innovations. Many of the changes will be modest in themselves but, in their cumulative effect, substantial improvement may be accomplished.

8.2 TIME LIMITS ON APPEALS

The appeal procedure in this province adheres to the English tradition in which the centrepiece of the appeal process is the oral argument. Argument is limited only by the judgment of counsel and by gentle and not so gentle hints from the bench. This is in contrast to the American practice wherein the written brief is of primary importance. In some American appellate courts, oral argument is permitted only with leave of the court; in others, oral argument is a right. In either case, however, oral argument is subject to a fixed time limit.

In the Ontario Court of Appeal, arguments have become very long. Some very exceptional appeals have lasted many weeks, but many unexceptional appeals take more than one day of argument. Regrettably, in many cases, a substantial portion of oral argument is a waste of time. Parts of the argument are often a tedious reiteration of the facts already set out in the written material, a lengthy exposition of well-known principles or a review, with no clearly defined purpose, of voluminous case law.

At this time, the Supreme Court of Canada is discussing with the bar a scheme whereby most appeals to that court would be allotted half a day and counsel would be expected to complete their arguments within that time. In Ontario, the Court of Appeal imposes time limits in motions for leave to appeal from the Divisional Court. The party seeking to appeal is allowed fifteen minutes and the other party is allowed ten minutes. This system works well. The arguments on these motions tend to be concentrated and to the point.

This Inquiry is not prepared to recommend fixed time limits for the argument of all appeals. This is not to say, however, that controls are not necessary. It is the present practice for counsel to estimate the time required for an appeal. This estimate is passed to the registrar who uses it in scheduling the caseload for the various panels of the Court of Appeal. It is not unusual for cases to take far longer than the estimate given.

The estimate should be translated into more than just a scheduling tool. **It is recommended that counsel, in appeal cases, be required to estimate the time needed and that except with leave of the court, the estimated time will be the maximum time allowed. This estimate should be given not only to the registrar but should be transmitted to the court hearing the appeal by inclusion in each factum.** This method of limiting time is an important first step, but this step alone would simply produce excessive estimates.

It is also recommended that statutory recognition be given to the power of the court to impose time limits on argument in appeals. The court should be able to exercise this power before the appeal commences or even during the course of the appeal if it appears that the argument is simply a waste of time. This kind of time limit would be tailored to the case as opposed to the fixed limit of general application. The ability of the court to override the estimate will likely be seldom used, but will have the effect of keeping the estimates within reasonable bounds.

8.3 SUMMARY PROCEDURE FOR APPEALS

As already outlined, the method of appeal in Ontario is the orally argued appeal. There is, however, one exception to this general rule. In criminal cases, prisoners may present their appeal in writing. This form of appeal is generally quicker since the case does not have to be listed for hearing but need only be circulated among three judges. It is, of course, economical.

It is recommended by this Inquiry that written appeals should be extended to and be mandatory in small civil appeals such as the civil appeals emanating from the Provincial Court. By virtue of the simplicity and economy of this method of appeal, remedy by way of appeal will be made much more accessible to the ordinary litigant. It is acknowledged that there may be exceptional cases emanating from the Provincial Court which will not be amenable to the written appeal process and **it is therefore recommended that, with leave, oral argument be permitted in Provincial Court civil appeals.**

8.4 ALTERNATIVE METHODS OF DISPUTE RESOLUTION

In recent years, with the increasing cost of litigation and the delays in the court system, many have sought and experimented with other methods of resolving disputes which avoid the need for a trial. In the main, these other methods are simply common sense procedures whereby the parties and their lawyers, or both, are invited or compelled to come together in an informal setting and are then encouraged and assisted to narrow the issues and, if possible, to agree upon a resolution of either part or all of the dispute. These procedures take different forms, such as pre-trial conferences and mediation. Arbitration, although an alternative to trial, is still a method of adjudication rather than a settlement process and will be dealt with separately. Pre-trial conferences and mediation are now used in Ontario. However, the use of these procedures and the success enjoyed varies widely. In some areas, pre-trial conferences are widely used; in other areas, hardly at all. Some judges conduct pre-trial conferences; others do not.

It is the opinion of this Inquiry that the various mechanisms for resolving disputes outside the courtroom should be used to the fullest because they spare the parties the very high costs involved in going to court and also the trauma of the trial process. The latter aspect is particularly relevant in family disputes.

It is appropriate, however, to sound a note of caution. Alternate methods of dispute resolution are not cure alls. They do not always work. The procedures should be regarded only as a part of the total package of services offered by the justice system. The courtroom will remain the ultimate method of resolving disputes when other methods have been tried and have failed.

There are a number of reasons why alternative methods of dispute resolution are not more widely used and why they are not more successful. Some judges and lawyers still do not regard these mechanisms as an integral part of the justice system. They are viewed as inherently second class procedures which are not consistent with their expectations as to what competent judges and lawyers should be doing with their time. In short, there is no commitment to these methods as a real alternative. Partially as a consequence of this lack of commitment, the participants do not prepare sufficiently for pre-trial conferences. Judges do not read and fully understand the advance material. Lawyers may be ill-prepared or send juniors who know little or nothing about the case.

Some judges and lawyers are not particularly good at pre-trial conferences and mediation. The traditional skills of trial lawyers and judges may not be sufficient. There are also some weaknesses in the Rules of Civil Procedure and in the legislation dealing with procedures for alternative methods of dispute resolution.

It is the opinion of this Inquiry that steps must be taken to emphasize the concept that, at least in civil cases, resolving issues in the courtroom is the process of last resort and should only be invoked when other methods have been tried and failed. Criminal cases rest on a somewhat different footing. Civil cases ordinarily concern only the parties and if they can resolve their disputes privately, no problem arises. In criminal cases, the participants are not just the accused and the prosecution, the public also has a very real interest. Granted that the prosecutor represents the public, but the process of resolving criminal cases requires a quality of openness and a compliance with the appearance of justice that is not present to the same degree in civil cases. However, having said all of that, there are still substantial benefits to be gained in criminal cases by an intelligent process whereby steps can be taken to admit the obvious, narrow the issues and even ascertain that an accused may be prepared to plead guilty to some charge or that the crown may have a weak case.

An increase in the successful use of alternative methods of dispute resolution can be accomplished only by substantial changes in attitude and by the improvement of skills. The best place to begin this process of change is with the judiciary. **This Inquiry therefore recommends that the judiciary set up seminars and continuing legal education programs with respect to the value and operation of alternative methods of dispute resolution and that, more importantly, these seminars include instruction with respect to the skills necessary to conduct effective pre-trial conferences and mediation hearings.** It is anticipated that as the judiciary become more expert in pre-trial and mediation procedures, the legal profession will be compelled to follow.

8.5 PRE-TRIAL - CIVIL CASES IN SUPERIOR COURT

Rule 50.01 of the Rules of Civil Procedure provides as follows:

> 50.01 In an action or application, a judge may, at the request of a party or on his or her own initiative, direct the solicitors for the parties, either with or without the parties, and any party not represented by a solicitor, to appear before a judge or officer for a pre-trial conference to consider,
>
> (a) the possibility of settlement of any or all of the issues in the proceeding;
>
> (b) the simplification of the issues;
>
> (c) the possibility of obtaining admissions that may facilitate the hearing;
>
> (d) the question of liability;
>
> (e) the amount of damages, where damages are claimed;
>
> (f) the estimated duration of the hearing;
>
> (g) the advisability of having the court appoint an expert;
>
> (h) the advisability of fixing a date for the hearing;
>
> (i) the advisability of directing a reference; and
>
> (j) any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

This rule previously began with the words, "Where an action has been placed on a trial list or an application is ready to be heard, a judge may, at the request of a party...". As a result, under the previous rule, pre-trial conferences took place on the eve of trial. It is now possible for a judge to order an early pre-trial. The amendment to the rule was made in 1986 and, thus far, early pre-trials have not yet taken place with any frequency.

This Inquiry proposes two changes which, it is believed, will stress the importance of the pre-trial conference and improve its availabity. It is **recommended**

that a pre-trial conference should be compulsory and that no case should be listed for trial until a pre-trial conference has been held. Cases that are set down for trial and in which no pre-trial conference has been held should be automatically listed for a pre-trial hearing; and only after such a hearing should the case be listed for trial.

Up until now, there has been a reluctance to make pre-trial conferences mandatory because the circuit system in the High Court made it almost impossible to provide this service on a regular basis outside of Toronto. With regionalization, the problems caused by the circuit system will disappear.

While the rules allow for early pre-trial hearings, the hearing will only be held on a judge's order. The Inquiry sees no need for this requirement. It is **recommended that, after the close of pleadings, any party to the action to the trial may obtain a pre-trial hearing simply by asking for it.** An early pre-trial would qualify as the pre-trial which is the condition precedent to placing a case on the trial list, but an early pre-trial would not foreclose any party from asking for an additional pre-trial hearing. An over use of the pre-trial system can be regulated by the award of costs.

It is worthwhile to here state the obvious. Settlement of the entire case is of course a desirable result. But the fact that this cannot be accomplished does not render the pre-trial conference unnecessary or ineffective. The resolution of as many issues as possible, short of settlement, remains a highly desirable objective.

Rule 50.02 provides as follows:

> 50.02(1) At the conclusion of the conference,

> (a) counsel may sign a memorandum setting out the results of the conference; and
>
> (b) where the conference is conducted by a judge, the judge may make such order as he or she considers necessary or advisable with respect to the conduct of the proceeding,
>
> and the memorandum or order binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustice.
>
> (2) A copy of a memorandum or order under subrule (1) shall be placed with the trial or application record.

It will be observed that rule 50.02(1)(b) gives the judge presiding at the pre-trial conference very wide powers to regulate the course of the action. This power will become far more important in an early pre-trial and will obviously include the powers under rule 37.16 (limiting motions) and the proposed new rule (see section 8.19 below) giving the court power to limit oral and documentary discovery.

Currently, pre-trial conferences are conducted by judges, and commissioners who are appointed as officers of the Supreme Court pursuant to s. 24 of the Courts of Justice Act. Commissioners, however, do not have the power of a judge under rule 50.02 or 37.16 or the proposed power to limit discovery. **It is therefore recommended that, ordinarily, pre-trial conferences should be conducted by judges.**

Judges conducting pre-trial conferences should encourage real participation in the process by using their power under rule 50.06 with respect to costs. Those who are not prepared for the hearing or who do not realistically participate in the process should be penalized in costs. This is not to suggest that a refusal to settle or agree on matters should be penalized, but plainly obstructive tactics or indifference should be penalized.

8.6 PRE-TRIAL CONFERENCES - PROVINCIAL COURT (CIVIL DIVISION)

The rules of the Provincial Court (Civil Division) provide as follows:

> 14.01(1) A party may request a pre-trial conference by filing a request for pre-trial conference (Form 14A) with the clerk.
>
> (2) The court may, before or at the trial, in response to a request for pre-trial conference or on the court's own initiative, direct that a pre-trial conference be held before a judge or another person designated by the court, and the clerk shall fix a time and place for the pre-trial conference and send to each party who has filed a claim or defence a notice of pre-trial conference (Form 14B).
>
> (3) The court may impose appropriate sanctions, by way of costs or otherwise, for the failure of a party who has received a notice of pre-trial conference to attend the pre-trial conference.
>
> (4) Where a person attends a pre-trial conference but, in the opinion of the judge or designated person hearing the pre-trial conference, is so inadequately prepared as to frustrate the purposes of the pre-trial conference, the court may award costs against that person.
>
> (5) Costs awarded under subrule (3) or (4) shall not exceed $50 unless there are special circumstances.
>
> (6) Where an action is not disposed of within fifteen days after the date fixed for a pre-trial conference, the clerk shall, unless the court orders otherwise, fix a date for trial and send to each party who has filed a claim or defence a notice of trial (Form 17A).
>
> 14.02(1) The purposes of a pre-trial conference are,
>
> (a) to resolve or narrow the issues in an action;

(b) to expedite the disposition of the action;

(c) to facilitate settlement of the action;

(d) to assist the parties in effective preparation for trial; and

(e) to provide full disclosure between the parties of the relevant facts and evidence.

(2) At a pre-trial conference, the parties or their representatives shall openly and frankly discuss the issues involved in the action but, except as otherwise provided or with the consent of the parties, the matters discussed at the pre-trial conference shall not be disclosed.

14.03 (1) The judge or person designated by a judge may at a pre-trial conference make recommendations to the parties on any matter relating to the conduct of the action in order to fulfill the purposes of a pre-trial conference, including recommendations as to,

(a) the formulation and simplification of issues in the action;

(b) the elimination of claims or defences which appear to be unsupported; and

(c) the admission of facts or documents without further proof.

(2) The judge at a pre-trial conference may make any order relating to the conduct of the action that the court could make, including an order,

(a) for the joinder of parties;

(b) amending a claim or defence under Rule 11;

(c) for discovery under Rule 13;

(d) referring a matter to a referee under Rule 22; and

(e) for costs under subrule 14.01(3) or (4).

(3) Where a person has been designated by

> the court to hear a pre-trial conference, a judge, upon the recommendation of the designated person, may make any order that could be made under subrule (2).
>
> (4) The judge or the designated person before whom the pre-trial conference is held may prepare a memorandum of the matters agreed upon by the parties at the pre-trial conference and where such a memorandum is prepared it shall be filed with the clerk.

This Inquiry is of the opinion that, in general, the foregoing rules are adequate and sufficiently flexible to provide for an effective pre-trial procedure. There are, however, two changes that should be made. In practice, the pre-trial hearings in the Provincial Court (Civil Division) are conducted by the clerk of the court or referee. This is done by order of the judge pursuant to rule 14.01. **It is the recommendation of this Inquiry that the rules be amended to reflect reality and provide that the pre-trial be held before the clerk of the court or referee unless otherwise ordered by the judge; and in that instance, the pre-trial must be conducted by a judge.**

It is, of course, essential that the clerks and referees be sufficiently knowledgeable to conduct pre-trial hearings. To insure that this is so, **it is recommended that suitable instruction be provided to the clerks and referees, with particular emphasis on consumer protection legislation.**

In the larger centres, pre-trial hearings are almost always conducted before a case is listed for trial. Earlier, we expressed the opinion that pre-trial should be mandatory and this general observation applies to Provincial Court civil cases as well. Amending the rules for civil cases in the Provincial Court would do no more than to bring the rule into conformity with the actual practice. **This Inquiry therefore recommends that in the Provincial Court a pre-trial be a necessary prerequisite before a civil case is listed for trial.**

8.7 PRE-TRIAL - FAMILY LAW MATTERS

The rules of the Unified Family Court provide as follows:

> 20. As soon as reasonably possible after the commencement of a proceeding, the presiding judge shall inquire whether or not attempts have been made to resolve or narrow the issues in dispute, which issues have been resolved or narrowed and whether settlement by the parties of the issues remaining in dispute is likely.
>
> 21.(1) For the purpose of resolving or narrowing the issues or of settling the procedures at a hearing, the court, at any stage in the proceeding, may convene one or more meetings of the parties before a judge of the court or a person designated by the court.
>
> (2) The person before whom a meeting under subrule (1) is convened shall present to the parties, for their approval in writing, a memorandum in Form 2A of the matters agreed upon by the parties at the meeting and the person shall file the memorandum unless the parties file a consent to a final order disposing of all issues.
>
> (3) A judge before whom a meeting under subrule (1) is convened shall not preside at the hearing without the consent of the parties.
>
> 22. Subject to rule 75, and with the consent of the parties, the court may make any order authorized by these rules or the Act governing the proceeding without a hearing.
>
> 53. The court may order a person or agency, with the consent of the person or agency, to make an investigation related to a proceeding in which support or custody of or access to a child is in issue, may order a party or parties to pay the costs of the investigation and may receive evidence resulting from the investigation.

The Courts of Justice Act, 1984 provides in s. 49,

> 49. A concilation service may be established, maintained and operated as part of the Unified Family Court.

If the recommendations of this Inquiry are accepted, it will be the rules of the Unified Family Court that will apply to all family law matters. It is observed that the rules of the Provincial Court (Family Division) closely parallel the Unified Family Court rules.

The rules, coupled with the statutory provisions, confer wide powers upon the court. It should be made clear that in family law matters, the pre-trial proceeding may take a variety of forms.

8.8 ANALYTICAL PRE-TRIALS

In some family law disputes, or parts of them, the function of the pre-trial inquiry is largely analytical, such as the identification of issues, sorting out the matters that can be agreed upon and resolution of evidentiary issues. The function is about the same as the pre-trial inquiry in an ordinary civil case. In those cases where the issues between the parties are largely monetary, the conventional pre-trial procedure will suffice.

8.9 CONCILIATORY PRE-TRIALS

In ordinary civil cases, the parties will resolve their disputes by settlement or trial, and will walk away from the matter and perhaps never encounter each other again. In contrast, however, the resolution of some matrimonial disputes involves setting out a regime governing the future conduct of the parties. Custody of and access to children are the principal examples of matters involving the future relations of the parties. Disputes of this nature should not be resolved in the same manner as monetary issues. Disputes involving the custody of and access to children are difficult, sensitive and emotional and are best resolved in an atmosphere of moderation and conciliation. In such an atmosphere, there is at least the possibility of leading the parties to an agreement. Such an agreement is usually superior to an externally imposed solution. It is more likely to be honoured and less likely to produce continuing friction. It bears repeating that the adversary method is a poor way to resolve any matrimonial dispute and is the worst way to resolve the issues of custody and access.

The power given to the judge (rule 21) enables the judge to refer the parties to a mediator. There is no reason why the judge cannot perform the role of mediator. However, in busy courts, it will be more efficient if this function is performed by someone else.

The mediator or mediation services can be built into the court system or be performed by an outside agency. The determination of which mechanism is best should be left to the regional Courts Management Committees.

8.10 DIAGNOSTIC PRE-TRIALS

In some cases involving custody or access, it will be clear to the judge who meets the parties that outside professional assistance is necessary before any intelligent effort towards resolution of the dispute can be taken. Exercising the authority given by rule 53, the court may require an assessment of either the spouses or the children or all of them by a psychiatrist, psychologist, educator or social agency. This kind of assessment will likely be of great benefit to the parties and will go a long way towards the resolution of the dispute.

By classifying the various pre-trial functions as we have, it is not suggested that these functions fall into watertight compartments and that there should be no overlapping; they obviously will, and should, overlap. It is also clear that the judge who first deals with the parties pursuant to rule 20 will have to decide which of the available procedures - one or all - should be used, and if more than one procedure is used, in what order they should be used. We note that the rules provide for a pre-trial meeting and that such a meeting is mandatory and early. We think that the power of the court to resort to alternative methods of dispute resolution is sufficient and requires only a commitment by both bench and bar to the use of these methods.

8.11 PRE-LITIGATION MEDIATION

There is but one proposal that we make respecting the extension of the above procedures. As the rules stand, all of the above procedures are contingent upon the commencement of court action. In the Unified Family Court, there has begun, on a voluntary basis, the practice of providing a mediation service which extends to issues of custody, access, support and division of property before the commencement of an application. The Inquiry believes that this is a worthwhile endeavour. It is a service that is provided by the family courts in many jurisdictions. This procedure holds great promise because the expense of resolving family disputes can be kept low. The likelihood of settlement is high because this kind of early mediation takes place before attitudes have become hardened by the institution of court action.

This Inquiry therefore recommends that the rules respecting matrimonial cases be amended to provide that, prior to the commencement of an application, either spouse may request mediation and that, upon receipt of such a request, mediation service will be offered to the parties.

If the non-requesting spouse refuses to attend the mediation hearing, there should be no sanction. Refusal to participate simply indicates that court action is required. The experience in Hamilton, as well as other jurisdictions, however, indicates that there are enough people who are anxious to take advantage of mediation services to make the provision of this service worthwhile.

8.12 CRIMINAL PRE-TRIAL

The Criminal Code was amended in 1985 to include the following:

> 553.1(1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may, with the consent of the prosecutor and the accused, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider such matters as will promote a fair and expeditious hearing.
>
> (2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 438 to consider such matters as will promote a fair and expeditious trial.

Thus far, this section has not been proclaimed. Both the High Court and the District Court have made rules of court, pursuant to s. 438, dealing with pre-hearing conferences.

For a number of years, prior to the enactment of this section, pre-trial hearings in criminal cases have been conducted in Ontario on an informal basis. The foregoing section will make the pre-hearing conference mandatory prior to jury trials. Subsection (1), which deals with trials other than jury trials, will make a pre-trial hearing dependent upon consent of both prosecution and defence. There are many long and difficult trials that are tried without the intervention of a jury in the criminal courts of this province. It is the opinion of this Inquiry that the pre-hearing conference is as important a mechanism in non-jury trials as it is in jury trials and that the pre-trial conference in non-jury trials should not be dependent upon consent.

It is recommended that the Attorney General should seek an amendment to s. 553.1 of the Criminal Code to provide that a pre-trial hearing in non-jury cases may be held upon order of the presiding judge, which order may be made upon the application of either crown or defence.

It is to be observed that there is an important difference between pre-trial conferences in criminal cases and those in civil cases. In civil cases, there are two principal objectives, the settlement of the whole case or, failing that, the resolution of at least some of the issues, with a view to confining the trial to the real issues in dispute. In a criminal pre-trial conference, the principal goal is agreement on some or all of the following:

- facts about which there can be no real dispute;
- procedural and evidentiary issues;
- the identification of the real issues at trial.

Often, in the course of addressing these issues, it will appear that there is very little in dispute and the defence may offer a plea that is acceptable to the prosecution and the court. For example, even though the charge before the court is murder, it may appear that the crown's case is unlikely to warrant a murder conviction, but only that of manslaughter. If the accused is willing to plead guilty to manslaughter, there is little point in the trial and a plea of manslaughter will usually be accepted.

It should be emphasized, however, that the criminal pre-hearing conference should not be misused. It is not a mechanism whereby courts or prosecutors should be tempted to reduce or control caseloads by accepting inappropriate pleas to lesser offences, or holding out the promise of a lesser penalty. The pre-hearing conference is a valuable mechanism by which the waste of the time of judges, prosecutors, defence lawyers, police and witnesses alike can be avoided, but the process must be handled with integrity and care.

It is recommended that the local Courts Management Committee closely monitor the pre-hearing conference in criminal cases in order to ensure that the process is not abused.

8.13 COURT ANNEXED ARBITRATION

It is, of course, possible for people to submit their disputes to arbitration rather than take their disputes to court. In most cases, this will occur when the parties, prior to the dispute, oblige themselves by contract to submit subsequent disputes to arbitration. It is a rare case in which parties not so obliged by contract will resort to arbitration rather than proceed to litigation.

It is probable that this results from two causes. Firstly, there is no conventional mechanism for invoking arbitration. Parties who are already involved in a dispute may find it difficult to either propose or accept a non-conventional method of resolving a dispute. Secondly, it may be that parties to a dispute are reluctant to accept the virtual abandonment of any right to appeal that is involved in the submission to arbitration.

There are advantages that can result from arbitration. In difficult technical cases, the parties can select an arbitrator with particular expertise in whom they might have more confidence than a randomly assigned judge. In those disputes where speed is unusually important, an arbitration can be arranged very quickly without waiting one's turn on a long court list. Additionally, the procedure on arbitration is customarily less formal and technical and, as a result, is quicker and therefore more economical.

It is recognized that arbitration may not be appropriate in many cases and that there is an element of privatization of the justice system in arbitration. However, these factors should not deter the provision of arbitration as a part of the total package of alternative dispute resolution mechanisms.

We have addressed the issue as to whether submission to arbitration should be compulsory in some classes of cases or ordered by a judge, and have concluded that the arbitration procedure should be based upon consent. There are two reasons which support this view. First, it is probable that it would be unconstitutional to compel parties to a case within the jurisdiction of a superior court to submit to arbitration, since this process would have the effect of constituting the arbitrator a s. 96 judge. This reason by itself is not pivotal since elsewhere in this report it has been recommended that a constitutional amendment be sought in order to accomplish some particularly desirable objective.

There is a second and more compelling reason. Our justice system is a social service, publicly funded and generally accessible to all. It would be inappropriate to deny a "day in court" to a particular class of litigant because the case is a commercial case or is too complex or too time consuming. Even those who can afford to pay for private justice have a right to public justice if they so choose. **It is recommended that a voluntary arbitration**

mechanism be built into the justice system.

In order to remove some of the obstacles standing in the way of arbitration, while preserving its advantages, it is recommended that after the commencement of a proceeding, either party may propose that the matter be resolved by arbitration. If the other party or parties agree, and the parties agree upon an arbitrator, the matter should proceed forthwith to arbitration. The arbitration should be a procedure of record and the procedure should accord with the principles of natural justice but the strict rules respecting the admissibility of evidence need not be observed. The arbitration award, when rendered, should be filed with the court in which the matter was commenced and be deemed to be a judgment of that court and appealable as a judgment of that court. The fees of the arbitrator should be paid by the parties to the dispute.

8.14 PARTY AND PARTY COSTS

In some systems of justice, there are no awards of costs as we know them in Ontario. Costs in some jurisdictions involve only the actual expenses of litigation such as the filing fees and cost of the service of process.

In Ontario, costs include large amounts which at least partially cover lawyers' fees. The award of costs fulfills two general purposes: compensation to the party aggrieved, and a sanction against the party who is in the wrong.

There are improvements that can be made in the award of costs. Firstly, the award should be more discriminate. Currently, awards of costs are simply made to the winner almost as a matter of course. There is very little "fine tuning" of the award of costs. A successful party who has been guilty of unduly prolonging the proceeding should not be rewarded for it. Even a successful party should be awarded only costs calculated on the basis of the amount of time that the matter ought to have taken. Judges and judicial officers should be encouraged in their award of costs to specify the basis of calculation. There is no necessity to amend statutes or rules to award this kind of power since it already exists. The assessment officer, who of course is not present at the trial or other proceeding, would find it impossible to assess how long a proceeding ought to have taken when he or she was not present.

In extreme cases, the order awarding costs on the basis of how long the proceedings ought to have taken might oblige the successful party to compensate the unsuccessful party for the time wasted.

Entirely apart from such qualifications in the order awarding costs, the paramount principle in the assessment of costs should be the value of the work done and not the amount of time spent or the number of steps taken.

It is recommended that for the assistance of assessment officers, the rules of the various courts be amended to spell out the principle that the paramount consideration in the assessment of costs is the value of the work done.

8.15 SOLICITOR AND CLIENT COSTS

Solicitor and client assessments only occasionally flow from an award of costs which might contain a specific direction. Most solicitor and client assessments of costs result simply from a dispute between lawyers and clients over the fee. But, in solicitor and client assessments as well, the operative principle should be the value of the work done. Inefficiency should not be rewarded. **It is recommended that the Solicitors Act be amended to spell out the principle that solicitor and client assessments of costs should reflect the value of the work done.**

8.16 LEGAL AID

The same general concept that inefficiency and waste should not be rewarded applies equally to the assessment of Legal Aid fees. Since most Legal Aid fees are generated in criminal cases, some innovations will be required. **It is recommended that a mechanism be developed whereby there is some communication between the trial judge and the Legal Aid authority.** Currently, there has been such communication only when a trial judge was particularly outraged at the waste of time. Communication between the judge and Legal Aid should be encouraged. **It is recommended that provision should be made that in any trial lasting more than two days, the trial judge be required to certify whether the duration of the trial was reasonable or unreasonable, and if unreasonable, what an appropriate length would have been. The assessment of fees should then proceed on the basis of this opinion.** Putting this kind of power in the hands of the trial judge will doubtless cause some upset in the ranks of the criminal bar. This concept, however, is not revolutionary. Wide power over costs has always existed in civil litigation and there is no evidence that it was ever abused. The power to affect Legal Aid compensation in criminal cases would be an important, even if seldom used, deterrent to the waste of time.

8.17 ADVERSARY SYSTEM

Judicial proceedings in common law jurisdictions are based on the adversary system. The role of the judge in such a system is to remain objective, detached and to question witnesses only for the purpose of clearing up some obscure point. Generally speaking, the judge cannot call a witness, and should not play the role of advisor to the parties. However, it is apparent that in cases where parties are unrepresented by counsel, a degree of intervention by the judge is necessary. It is not suggested that the judge should ever be less than impartial or should become an advocate for one party. However, a judge should be free to assist both parties by explaining appropriate procedures, pointing out to them evidence that should be called, and suggesting adjournments if essential facts or witnesses are missing. It is likely that this sort of thing has always been done in the Provincial Court (Civil Division) and its predecessor courts and also in the Provincial Court (Family Division). It is recommended that this procedure be regularized and that judges not be inhibited from doing what is plainly necessary in this kind of case.

It is therefore recommended that the *Courts of Justice Act* be amended to provide that, in civil and family cases in the Provincial Court, a judge should not be bound by the strictures of the adversary system in cases in which the parties are unrepresented by counsel and in which the interests of justice demand intervention.

8.18 SPECIALIZATION OF JUDGES

Dean Roscoe Pound of the Harvard Law School was one of the leading spokesmen of the early 20th century for court reform. One of the proposals he advocated was the use of specialist judges within courts of general jurisdiction. This idea retains validity.

It is inherent in the structure of the Provincial Court that specialization of judges will take place. This principle should be applied as well in the Superior Court to the extent possible, and without interfering with the flexible management of that court. The cases coming before the superior trial courts are increasing in difficulty and complexity and it is often desirable that cases of particular difficulty be heard by a judge who is experienced in that particular field.

The age of the specialist in many fields, including the practice of law, is already upon us and there should be no shame attached to the admission that not all judges are equally competent to handle every kind of case. **It is recommended that, to the extent possible, cases of unusual difficulty or technicality should be assigned to judges experienced in that kind of case.**

It is a function of the Superior Court to deal with bankruptcy matters. In an earlier era, bankruptcy cases were assigned to one or two judges who had expertise in that field. This procedure worked very well. Currently, this work is handled by a large number of High Court judges on a rotational basis. This present system is far less satisfactory than the former system of utilizing specialist judges. Bankruptcy cases are an example of cases of unusual technicality and it is a field in which many judges and practitioners have little or no experience. **It is therefore recommended that bankruptcy matters be assigned to a small number of judges experienced in that field.**

8.19 CONTROLLING THE PROCESS IN CIVIL CASES

Members of the bar have suggested to this Inquiry that the number of interlocutory procedures and the extent of discovery have increased to a high degree in recent years. It is apparent that an overuse of these procedures contributes substantially to the growing costs of civil litigation. Rule 37.16 of the Rules of Civil Procedure provides as follows:

> 37.16 On motion by any party, a judge or master may by order prohibit another party from making further motions in the proceeding without leave, where the judge or master on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions.

This rule appears to be adequate to control the overuse of motions.

It has been submitted, as well, that the extent of the oral and documentary discovery has increased dramatically and that this increase is attributable to the new Rules of Civil Procedure. Whether the increase can be attributed to the new rules is debatable. However, whatever the cause, it is apparent that there should be a mechanism to control the overuse of the discovery process. Rule 31.03(9) provides as follows:

> (9) Where a party is entitled to examine for discovery,
>
> (a) more than one person under this rule; or
>
> (b) multiple parties who are in the same interest,
>
> but the court is satisfied that multiple examinations would be oppressive, vexatious or unnecessary, the court may impose such limits on the right of discovery as are just.

This rule does not appear to be adequate to the task. It covers only multiple examinations. What is needed is a rule to control the extent of discovery, even if only one person is being discovered.

It is recommended that the Rules Committee add to the Rules of Civil Procedure a rule similar to rule 37.16 dealing with both oral and documentary discovery where discovery of only one person is involved.

8.20 MOTIONS BY TELEPHONE CONFERENCE

Traditionally, the administration of justice has functioned only with the principal actors in the same room. With the advance of technology, changes are taking place. Recently, the Supreme Court of Canada began hearing applications for leave to appeal via satellite television communication. Lawyers in British Columbia have argued leave applications before judges sitting in Ottawa. Section 443.1 of the Criminal Code provides for telewarrants, a telephone procedure for the issuance of search warrants. Rule 37.12 of the Rules of Civil Procedure provides that contested motions in civil cases may be heard by conference telephone if the judge or other officer and all counsel consent.

Rule 37.12 has been little used. Resort to the use of the telephone in motions in civil cases can cut the amount of time spent in travelling and waiting. This procedure should be particularly attractive in cases where lawyers and the judge are separated by long distances. The result of using this procedure should be a diminution in the cost of litigation.

There are probably two reasons why the conference telephone is not widely used. Firstly, few of the courthouses in Ontario have appropriate equipment for the utilization of this procedure. While it is true that telephone conferencing can be arranged by using the ordinary telephone, more sophisticated equipment is desirable if one is to have hands free to deal with the record and case material. **It is therefore recommended that each courthouse be supplied with telephone equipment which facilitates motions by conference telephone.** It is, of course, not necessary that each judge's chambers be so equipped - only that such facilities be available in the courthouse.

Secondly, it appears that there exists among lawyers and judges alike a certain reluctance to use this procedure. **In order to encourage and educate the judges and legal profession, it is recommended that the Rules Committee designate a number of simple motions that can be dealt with by conference telephone at the request of either party.** It is hoped that, in this manner, the legal profession may become more familiar with telephone motions and will then make increasing use of Rule 37.12. **It is recommended that similar rules be enacted to provide for motions by telephone conference in the Provincial Court in the exercise of its civil and family law jurisdiction.**

8.21 MULTIPLE APPEARANCES IN CRIMINAL COURTS

In the Provincial Courts (Criminal Division), too much time is spent in the preliminary processing of cases. In many courts, the first one-half hour to one hour of the day is spent simply calling cases and awarding dates for subsequent appearances. For example, an accused appearing for the first time, as a matter of course (unless he or she pleads guilty), will be given a new date in order to seek advice, get Legal Aid or retain a lawyer. On the second appearance, the accused may or may not have obtained a Legal Aid certificate and may or may not have yet spoken to a lawyer and, in this event, a new date is given. When the accused does appear with a lawyer, further dates are given for a variety of reasons. It is not uncommon for a case to be dealt with in a courtroom seven or eight times before a plea is taken or a trial or a preliminary hearing held.

Thus, long court dockets are composed of the same cases which are handled over and over again. This process is a waste of the time of the court and the public. It increases the costs, whether paid by Legal Aid or by the accused, and places an unnecessary demand on the physical facilities by requiring large courtrooms and waiting areas for people who unnecessarily parade through the courthouse and the courtrooms.

There is no clearly defined reason why this situation exists. A possible explanation is that the adjournment periods are unnecessarily short and do not permit an accused enough time to seek Legal Aid, advice and a lawyer. It is possible, as well, that the courts are not firm enough in their scheduling policies. It is most likely, however, that the greatest reason for the multiplicity of appearances is that this system conforms with the expectation of the participants, prosecutors, defence lawyers and judges alike. In other words, this state of affairs has become "normal". It is therefore necessary to change the perception of normalcy.

It is recommended that the Chief Judge of the Provincial Court in consultation with the Ontario Courts Management Committee issue a practice direction that procedure along the following lines will be observed in criminal cases in Provincial Court:

1. First Appearance

At this time, if asked for, an adjournment would be given to permit an accused an opportunity to seek advice or Legal Aid and retain a lawyer. This adjournment period would also permit the lawyer time to seek disclosure from and discuss the case with the prosecutor.

2. Second Appearance

On this appearance, the accused would:

(a) plead guilty;

(b) plead not guilty and a trial date would be set in that court; or

(c) elect trial in some other court, at which time a date for preliminary hearing would be set.

3. Third Appearance

Depending on what had transpired on the second appearance, there would either be a sentencing, a trial or a preliminary hearing.

It is apparent that this model could not be followed strictly in every case. There would inevitably be some breakdowns, but the above model should be the target and large numbers of appearances without any real movement towards conclusion should not be tolerated. As a part of this new discipline, courts would of course have to take control of their own schedules and not permit themselves to be controlled by the diaries of lawyers.

It is further recommended that, to the extent possible, the preliminary appearances take place before a justice of the peace, thus further conserving the time of the Provincial Court judge.

There is one statutory impediment standing in the way of the full implementation of the above recommendations and that impediment is s. 738(1) of the Criminal Code which, in the absence of consent, limits adjournments in summary conviction cases to eight clear days. It is the observation of this Inquiry that consent is almost always given and it is doubtful whether or not the eight clear day limitation serves a useful purpose. In light of the fact that the Canadian Charter of Rights and Freedoms contains a guarantee of trial within a reasonable time, there is no longer a need for the eight day limitation on adjournments. **It is therefore recommended that the Attorney General seek an amendment to s. 738(1) of the Criminal Code eliminating the eight day limitation on adjournments.**

8.22 DISPROPORTIONATE CHARGES IN CRIMINAL CASES

One factor that causes persons accused of crime and their counsel to seek more elaborate methods of trial is the exposure to very high penalties, penalties that are likely far higher than the nature of the case may warrant. Some criminal conduct, while certainly not commendable, is not extremely serious. Prankish conduct can, on occasion, lead to a charge of breaking and entering a dwelling house, which carries a maximum penalty of life imprisonment (s. 307, Criminal Code). A minor fracas can lead to a charge of assault causing bodily harm (s. 245.3), which carries a maximum penalty of ten years

Even fairly serious manifestations of this conduct ordinarily attract penalties that are nowhere near the maximums. For example, the breaking and entering of a dwelling, depending on a variety of circumstances, ordinarily attracts a penalty of less than two years. Assault causing bodily harm will ordinarily attract a penalty of less than six months. The least serious modes of committing these offences therefore carry penalties that are far below the average.

One of the causes for this kind of overcharging stems from the Criminal Code itself. Crimes are classified in such a way that there is very little flexibility. The Law Reform Commission of Canada is currently engaged in a study of the classification of offences which may solve the problem. Since this study is already under way, it is not necessary for this Inquiry to say anything other than to observe that a more realistic classification of offences and their penalties is appropriate.

There is yet another factor which leads to overcharging and, indeed, the laying of an unnecessary number of charges which also imposes an extra burden on the courts. In Ontario, it is almost always the police who determine what charge or charges should be laid. It is true that crown attorneys take charge of the prosecution after the charge is laid and can then seek to amend, withdraw or substitute charges. Too often, however, an institutional inertia sets in and it becomes more unlikely that changes will occur.

It is the recommendation of this Inquiry that, to a far greater degree, crown prosecutors should be involved in the determination of what charge is to be laid. In this way, prosecutorial discretion can be exercised at the beginning where it is important. Also, less serious conduct (even though it may technically qualify for a more serious charge) can be the subject of a realistic charge. Additionally, the number of charges can be controlled. The police, no doubt out of an excess of caution, often tend to lay a large number of charges. A crown prosecutor will be able to determine more exactly what charges should be laid. This recommendation will cast an extra burden on the crown attorneys of this province and will be a contributing factor in the need to enlarge the number of crown attorneys in some areas.

8.23 EXPERT WITNESSES - CRIMINAL CASES

Rule 53.03 of the Rules of Civil Procedure provides as follows:

> 53.03 (1) A party who intends to call an expert witness at trial shall, not less than ten days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.
>
> (2) No expert witness may testify, except with leave of the trial judge, unless subrule (1) has been complied with.

Rule 53.08 provides that the leave required by rule 53.03 should be granted on terms and with an adjournment if necessary, unless to do so would cause prejudice or undue delay.

This is a very useful rule in civil cases. A similar provision for criminal cases would be equally useful. In those cases where there is little or no dispute about the expert's opinion, the opposite party, once he or she has seen the report, usually agrees to the report without the necessity of the witness being called. In those cases where there is a contest about the expert's opinion, the trial is more efficient and productive since the experts know the views of their opponents and the area of disagreement is usually reduced to a single point or two.

The criminal cases in which there is most frequently a clash of expert opinion are those in which insanity or some other mental condition is an issue. As long ago as 1969, it was said in the Report of the Canadian Committee on Corrections (the Ouimet Commission):

> We do feel, however, that it is possible to alleviate certain of the unfortunate implications of contradictory psychiatric evidence. This could be done by restricting the latitude for disagreement. Specifically, there is no reason why the experts for opposing sides could not exchange reports with a view to resolving as many of their differences as possible. A mandate to strive for agreement might very well result in such agreement. After all, psychiatric experts - as part of the criminal trial forum - do have a common purpose: that is, one of assisting the court in arriving at a fair and just verdict. [at 224]

This Inquiry endorses that view, and what is said about psychiatric evidence applies with equal validity to other fields of expert testimony. **It is the recommendation of this Inquiry that the Attorney General of Ontario seek an amendment to the Canada Evidence Act by adding to that Act a provision similar to rule 53.03.**

8.24 MEDICAL REPORTS

Section 52(1) of the Ontario Evidence Act provides as follows:

> 52.1(1) Any medical report obtained by or prepared for a party to an action and signed by a legally qualified medical practitioner

> licensed to practise in any part of Canada is, with the leave of the court and after at least seven days notice has been given to all other parties, admissible in evidence in the action.

Prior to the enactment of this section, doctors were obliged to testify in a great many personal injury cases in the courts of Ontario. Now, it is a rare case in which this is necessary. The medical report procedure has worked very well in civil cases. It is proposed that this procedure be adopted in criminal cases. There are a great many instances where doctors are obliged to testify in criminal cases to establish facts about which there is no substantial dispute. **It is recommended that the Attorney General of Ontario seek an amendment to the Canada Evidence Act to add a section similar to s. 52 of the Ontario Evidence Act.**

It is recognized that there is a degree of overlapping between s. 52 of the Ontario Evidence Act and rule 53.03. However, s. 52 is primarily directed to the instance in which only the report is used and rule 53.03 is directed to the case in which a doctor or, indeed, any other expert testifies at trial.

8.25 RULES OF COURT - CRIMINAL

In 1985, s. 438 of the Criminal Code conferred the power to make procedural rules upon all of the courts of criminal jurisdiction. Formerly, this power resided only in the Court of Appeal and the High Court. This is a welcome amendment.

This Inquiry, however, is concerned that the rule making power is given separately to each court. It is to be observed that, in civil matters, there are at least some consolidations of the rule making power. The Rules Committee of the Supreme and District Courts makes rules for the Court of Appeal, the High Court and the District Court. There are separate rule making bodies dealing with the Provincial Court (Civil Division), the Provincial Court (Family Division), and also the Unified Family Court. The Rules Committees of the Provincial Court (Family Division) and the Unified Family Court have members in common and cooperate closely.

It is the opinion of this Inquiry that the case for a single rule making authority is stronger in crimin[illegible]. cases. In civil matters, there may be a case for separate rule making authority in some of the courts because their functions are so widely separate. In criminal cases, however, there is a high degree of interrelationship between the courts. The cases which are heard in the criminal justice system at present, or as reorganized, are similar and often the same. It is important that the procedures be either the same or similar.

Cases which are the subject of preliminary hearings in one court are tried in another. Trials of the same offence may take place in either criminal trial court. Appeals move from one criminal court to another. Prerogative writs issue from one criminal court and obviously affect others. It is therefore highly desirable that procedural rules be enacted with an appreciation of the whole system.

It is the recommendation of this Inquiry that the Attorney General of Ontario seek an amendment to s. 438 of the Criminal Code which would provide that rule making power be consigned to a criminal rules committee. Such a rules committee should be composed of representatives of all of the courts with criminal jurisdiction in Ontario together with representatives of the prosecution and defence bars and the administration of the courts.

8.26 CROWN DISCLOSURE

When anyone is charged with a criminal offence, his or her counsel must, in most cases, make a number of decisions such as how to plead, in which court to be tried, and whether to have a jury or not. These decisions have a great impact on the justice system. Decisions with respect to what use will be made of the justice system depend on an intelligent assessment of the prosecution's case. Ordinarily, this can be done only if there is disclosure by the crown, and the earlier disclosure is made, the earlier the decisions will be made.

In the past, crown disclosure was accomplished on an informal basis between the prosecutor and defence lawyers. If no disclosure was made in this fashion, the preliminary hearing was (and still is) used as a discovery mechanism. It was not unknown, however, that in some counties the crown would adduce only enough evidence at the preliminary hearing to warrant a committal for trial and would hold back the balance of the case until trial. In any event, the use of the preliminary hearing as an instrument of crown disclosure is a slow, expensive and inefficient manner of accomplishing this purpose. The preliminary hearing has other valid reasons for its existence.

In general terms, crown disclosure varied widely between different areas and even as between different prosecutors in the same area. To address this unsatisfactory situation, in October of 1981, Mr. Roy McMurtry, then the Attorney General of Ontario, tabled in the Legislature a set of guidelines to crown prosecutors respecting disclosure in criminal cases. These guidelines are included in this report as Appendix 5.

The issuance of the guidelines improved the practice of crown disclosure. However, the criminal defence lawyers have told this Inquiry that the process of disclosure is still not satisfactory. These submissions can be divided into three parts which are set out below.

8.27 AVAILABILITY OF CROWN ATTORNEYS

It is said that in some areas it is very difficult to find a crown attorney who has the time to devote to making adequate disclosure. It is the opinion of this Inquiry that there is merit in this complaint. A solution to this problem is recommended in section 10.7 below.

8.28 DEGREE OF DISCLOSURE

It is submitted by the defence bar that more detail respecting the crown's case should be disclosed and, in particular, that copies of witnesses' statements should be provided rather than simply summaries or outlines of the testimony witnesses are expected to give. This Inquiry is not persuaded that the degree of disclosure is inadequate. The degree of disclosure described in the guidelines is sufficient in the overwhelming majority of cases to enable defence counsel to assess the position of the client. If there is a real doubt as to whether the disclosure overstates the crown case or is otherwise inaccurate, then likely a trial is necessary. This Inquiry is not prepared to recommend any increase in the degree of crown disclosure.

8.29 GUIDELINES NOT FOLLOWED

It is further said that, since the Attorney General's guidelines are only guidelines, they are not followed by some crown attorneys. This Inquiry has found this to be so. In some areas of the province, full disclosure is regularly made but, in others, it is inadequately made. It appears that in those areas where disclosure is made only sparingly, there is a fear that full disclosure will lead to fabricated defences.

No doubt there is an element of risk that when there is full disclosure, a defence can be tailored to meet the crown's case, but this Inquiry is simply not convinced that this possibility is so great that it should lead to a shutdown of the disclosure process in some areas of the province. Nor does it appear reasonable that the likelihood of fabricated defences is the subject of such variation from region to region as to justify a similar variation in the disclosure process. If disclosure in a particular region is perceived to lead to reasonable grounds for believing that defences are being fabricated, then the appropriate remedy is to initiate an investigation with a view to laying criminal charges for obstructing justice, or some like offence.

It is therefore recommended that the Attorney General upgrade the present guidelines respecting crown disclosure to a directive to be observed unless the crown prosecutor can demonstrate to the Attorney General why, in a particular case, disclosure should not be made.

CHAPTER 9

Court Accommodation

9.1 INTRODUCTION

The quality of the present accommodation for the courts varies widely. This variation may occur for historical reasons. The reason for the variation may be geographical. In the remote regions of the province, temporary ad hoc accommodation is the only economical choice. Population growth is also a factor. In Brampton, for example, growth has far exceeded predictions and as a result, court accommodation is overcrowded.

Variation in the quality of court accommodation is inevitable, but some of the accommodation being given the courts at the present time is unsafe, unsuitable or undignified.

9.2 THE SITUATION IN THE PAST

Both the McRuer Report (1968) and the Ontario Law Reform Commission Report on the Administration of Ontario Courts (1973) commented on the state of court accommodation in Ontario. In surveying the accommodation allotted to the then Magistrates' Courts (now Provincial Courts (Criminal Division)), the McRuer Report stated,

> ... courts are held in rooms that are not designed in any way to provide accommodation for courts. When accommodation for the Magistrates' Courts in which the administration of justice for the community is carried on is compared with accommodation that is provided for such operations as the work of the committees of a city council, the board of education and the other municipal and government offices in the city, one cannot come to any other conclusion than that those responsible have no concept of the elementary rights of accused persons and witnesses who may attend trials, and the rights of the public, to have justice administered with dignity and in

> circumstances that convey a respect for the law. [at 539]

The inadequate state of the accommodation of the Magistrate's Courts, the Juvenile and Family Courts (now Provincial Court (Family Division)) and the Division Courts (now Provincial Court (Civil Division)) led the McRuer Commission to recommend among other things that the province take over all financial responsibility for court accommodation. In 1968, the provincial government took over the responsibility for financing the administration of justice as a whole, which included the provision and upkeep of courthouses and other accommodation.

In 1973, the Ontario Law Reform Commission took another look at court accommodation. The results of their on site survey are summarized as follows:

> Many buildings were never intended to be used by the courts, so they lack many of the facilities needed for the proper administration of justice, such as holding areas, witness rooms, public waiting rooms, etc. Some facilities are over-utilized in that several courts are competing for the use of the same courtroom. This can result in delays and confusion. It is unfortunate if both sides are ready to proceed but cannot because court facilities are unavailable. Other facilities are under-utilized. ...
>
> Many of the inadequacies of the court accommodations fall into the category of space-quality problems. These are the features of the court facilities that most readily and most dramatically come to the attention of those using the courts. When a witness has to be interviewed in a crowded, noisy hallway or a judge has to constantly interrupt the courtroom proceedings until the roar of traffic outside subsides, a very unfavourable impression of the judicial system is created. Such deficiencies reflect badly on the calibre and importance of the proceedings. [at 260-261]

The Ontario Law Reform Commission Report recommended a structured approach to court accommodation, with long-term planning, minimum standards, and standardized courtroom designs.

9.3 THE PRESENT SITUATION

Unfortunately, despite the Ontario Law Reform Commission's recommendations, very little has changed since 1973. The Ministry of the Attorney General has recently been conducting a survey of each county and its court facilities. Some of the comments contained in the profiles echo statements made by the Ontario Law Reform Commission in 1973 and the McRuer Commission in 1968. The following statements are excerpts from these profile reports.

> There is no access to the building for persons in wheelchairs ... The courts facility has no holding cells and the witness room was formerly a hallway. ... The only area for public waiting is in the corridor and it becomes very congested when there is a large trial in progress. ... The barrister's robing room has a washroom but does not have any lockers. There is no separate robing room for women barristers. The room is in very poor condition and only seats ten lawyers, although there are about eighty members of the local bar. (Supreme and District Court, Cornwall)
>
> The jury deliberation room is poorly furnished and there is no ventilation. It is used as a holding facility except when there is a jury trial. ... Examinations for discovery are held in the courtrooms or any other room which is available. ... The premises have washrooms as well as a barristers' robing room. This robing room is used by both sexes, and provides no privacy. ... There is no exterior sign designating the building as a courthouse. (Supreme and District Court, Perth)

> There are no interview areas. There are no holding rooms near the courtrooms and there is no secure access for prisoners being escorted to the main courtroom. As well, prisoner and escort must ascend three flights of stairs to reach the courtroom. ... Two of the courtrooms do not have prisoner boxes, leaving the prisoner to sit in the front row of the public seating area. (Supreme and District Court, Sault Ste. Marie)
>
> The courtroom can become uncomfortably warm during the summer, as the sunlight coming through the windows is very strong. Ceiling fans have been installed, but are only of minimal benefit. The sound made by the fans interferes with the recording equipment used by the court reporter. ... (Supreme and District Court, Stratford)
>
> The main courtroom is large and impressive with a high domed ceiling (which has been repaired to prevent leakage, although leakage still occurs) ... (Supreme and District Court, St. Thomas).
>
> This [the Provincial Court (Civil Division)] is not an ideal location for a court office and a referee's hearing room as it is housed above a bingo hall and travel agency. (Administrative office, Provincial Court (Civil Division), Windsor).
>
> The Unified Family Court is working in cramped surroundings which have been only somewhat alleviated by the provision of an additional courtroom, two additional motions rooms and four additional interview rooms [at another location]. (Unified Family Court, Hamilton-Wentworth).
>
> When this Supreme and District Court facility was opened in 1967, it was expected to meet the needs of the County of Peel for at least the next twenty years. However, within seven years, the expansion space was fully utilized. (Supreme and District Court, Brampton)

There is still inadequate long range planning, no basic policy underlying the provision of court accommodation, and no standardized courtroom designs.

9.4 CONSOLIDATED COURTHOUSE

The ideal model for all court accommodation is one courthouse containing all levels of courts and their offices. Where this ideal cannot be met, at the very least courtrooms, administrative offices and judges' offices should be in one building.

This model of one courthouse for all courts is an ideal for several reasons. The most basic reason is that the public will have no difficulty knowing where to go when they are required to go to court. Secondly, a single courthouse allows for the most efficient use of courtrooms. Courtrooms can be assigned in advance according to the needs of the various courts housed in the courthouse. A single courthouse also minimizes the disparity between the facilities provided to the different levels of courts, which in turn minimizes the public perception that different levels of courts provide different qualities of justice.

A single consolidated courthouse is necessary if there is to be an integrated administration as is recommended in section 7.35 above. Finally, a consolidated courthouse encourages contact between provincial and federally appointed judges. This contact in turn leads to a cross-court collegiality which allows the development of common approaches to similar problems.

It is therefore recommended that all new courthouse design be based on the model of a consolidated courthouse, and that, to the extent possible, current facilities should accommodate all courts and court offices.

9.5 SATELLITE COURTS

This Inquiry expects that all permanent court centres will eventually have a consolidated courthouse. It is not necessary for this courthouse to be large, but its design should be able to accommodate both the Provincial and the Superior Courts.

Satellite court locations will, however, continue to be necessary. In the very large centres, like Toronto, decentralization makes sense because of the very large size of the population. However, even these "branch" operations should conform to the consolidated court principle wherever possible.

In northern Ontario, the enormous distances to be travelled dictate the need for Provincial Court satellite operations. The distances in southern Ontario are much smaller but there is still a need for satellite courts in various locations, in order to ensure easy access to the justice system at the Provincial Court level.

It is possible that the Superior Court may wish to sit in a satellite location. The regional Courts Management Committees can determine when, or even whether, the Superior Court will visit satellite locations.

It is the recommendation of this Inquiry that remote centres should be served by itinerant satellite court operations and that there should be permanent Provincial Court satellite courts in the smaller centres of Ontario.

9.6 AD HOC COURT FACILITIES

If proper use is made of all the courtrooms available, and the courtrooms are properly designed, there should rarely, if ever, be any need to resort to ad hoc facilities. The use of ad hoc facilities in locations where there are permanent court facilities does little to encourage public respect for the administration of justice. If the courts are incapable of providing proper accommodation for the people using the courts, the public may well question the quality of justice being provided by the courts. **It is therefore recommended where there is permanent court accommodation, resort to ad hoc accommodation should be kept to an absolute minimum.**

9.7 STANDARD COURTHOUSE DESIGN

The Inquiry visited a number of different courts and we were struck by the fact that courtrooms and courthouses which had been relatively recently renovated contained so many avoidable design flaws. The unsuccessful courtroom designs created almost insoluble problems for the people using them. Courtroom designs and specifications should be standardized so as to avoid these costly errors in the future. The Inquiry's recommendation that there be standard courtroom designs is not a new one. This recommendation was also contained in the Ontario Law Reform Commission's Report on the Administration of Ontario Courts (1973). The Law Reform Commission went a step further and drew up some standard courtroom layouts, two of which have been reproduced in Appendix 6.

Some of the best designed courtrooms which the Inquiry saw had been designed almost 100 years ago. It is clear that, unlike other buildings, courthouse needs are not changing. There is no need to update or "improve" a design which already works. Therefore, **it is recommended that a complete set of courtroom and courthouse designs be created to be used whenever new facilities are to be built or present facilities are to be renovated.**

9.8 COURTHOUSE SECURITY

It is a fact of life that security must form an integral part of any courthouse. Courthouse security takes a number of different forms. The transportation of prisoners, both to the courthouse and from a holding cell to the courtroom involves one form of security. This type of security is explored, and recommendations are made in section 7.36 above.

The second type of courthouse security involves the design of the building itself. **It is recommended that the courthouse should be designed so that judges and jurors have secure access to the courtrooms and the accused also has secure but separate access to the courtrooms from the holding areas.**

9.9 PUBLIC SPACES

Witness rooms, waiting rooms and jury rooms always seem to be the last rooms added to a courthouse and the first rooms to be cannibalized to make way for a new office or courtroom. To destroy the areas used by the public is not a solution to space problems. If there are no waiting rooms or jury panel rooms, then the public must wait in the corridors, circulation in the courthouse becomes difficult and security problems increase.

It is the recommendation of the Inquiry that the public spaces of a courthouse should be maintained and not renovated into courtrooms and offices.

In a single multi-court courthouse, all types of people will be using the courthouse. People attending court on a civil matter or a delicate family matter may not care to find themselves seated next to alleged criminals. Doing so may add to an already stressful situation.

Waiting rooms can be separated physically, or courts can be scheduled in such a way that criminal court is held at a different time from family court. In this fashion, the two types of clientele can be kept separate.

9.10 PUBLIC SERVICES

One frequent comment made by the public in their submissions to the Inquiry was that they did not know what was expected of them. They did not know where to go, where to stand, or what to say.

Courthouses are public buildings, and therefore need to be well signposted, both inside and outside. An information booth located on the ground floor, where a person can get directions to the appropriate courtroom or court office, would be useful. The information booth would be an even more useful asset if it were stocked with pamphlets telling the public about the process of appearing in court, indicating such things as where to stand and how to address the judge.

The court lists posted outside the courtrooms pose another problem. They are often poorly photocopied and as a result illegible. Even if the lists were properly copied, they would be indecipherable because the lists are drawn up for the benefit of court clerks and not for the public. A separate court list, listing the courtroom, starting time, the names of cases to be heard and the order in which they are expected to be heard, all printed in bold type would constitute a good informational aid to the public.

It is recommended that courthouses should be well signposted and that information pamphlets should be available for public use.

9.11 CONCLUSION

Court accommodation is only one aspect of the administration of justice, but it is an important one because it influences public perception of the quality of justice to be dispensed by a particular court. Poorly designed accommodation, inappropriate settings, and disorganized and chaotic public areas may lead the public to attribute the same casual and disorganized attitude to the justice system itself. It is therefore crucial that the courts be appropriately and properly housed.

CHAPTER 10

The People

10.1 INTRODUCTION

However well a court system may be designed and managed, and however excellent the available procedures, it remains a human enterprise. How well it functions will depend upon the industry, talent and dedication of all the people comprising the justice system.

10.2 THE JUDGES

Good judges are critical to the function of a good justice system. Even the system we now have functions because, despite its problems, good judges make it function.

By virtue of s. 96 of the Constitution Act, 1867, judges of the Superior and District Courts are appointed by the Governor General in Council; in effect, the federal cabinet. Recommendations to the cabinet are made by the Minister of Justice, except for recommendations respecting the appointment of chief justices, which are the prerogative of the Prime Minister. Provincial judges are appointed by the Lieutenant Governor in Council of the province; in effect, the provincial cabinet. The cabinet acts on the recommendation of the Attorney General.

It is, of course, very important that great care be exercised in the selection of judges, especially since the appointments are, for all practical purposes, permanent. Judges can be dismissed for cause but this rarely happens. A bad appointment is a serious error which can impair the quality of our justice system for a very long time.

A good judge must possess a number of qualities. Firstly, the judge must be of high moral character. He or she must be knowledgeable in the law, patient and hardworking and, above all, the judge must be blessed with that intellectual talent which can only be described as good judgment. In an address to the Canadian Bar Association in August of 1984, Chief Justice Dickson said, "The public is entitled, in my opinion, to be reassured that our judges are appointed on the basis of merit and legal excellence alone."

Unfortunately, judges are not always appointed on the basis of merit and excellence alone. Generally speaking, Canada and Ontario have been remarkably well served by the judiciary, but there is substantial room for improvement in the appointment system. The problem arises from the fact that political considerations intrude upon the appointing process. It is the conviction of this Inquiry that political considerations, be they membership in a political party, sex or ethnic background, should be neither positive nor negative factors in the search for appointees to the bench. The preoccupation of those making the appointments should be with excellence and merit alone.

A committee of the Canadian Bar Association prepared a report entitled The Appointment of Judges in Canada, dated August 20, 1985, which contains an in depth study of the appointment of judges in Canada. This report also contains detailed recommendations for the improvement of the process. Little point would be served by attempting to duplicate what has already been done. It is sufficient to say that this Inquiry is in complete agreement with that report and endorses its recommendations. The recommendations of that report are set out in full in Appendix 7.

10.3 OFFICE OF CHIEF JUSTICE OR CHIEF JUDGE

The office of chief justice (or chief judge or associates) carries with it a high degree of prestige and equally high burden of responsibility. The chief justice is expected first and foremost to be a judge and perform the normal duties of a judge in the court over which he or she presides. The chief justice is also expected to at least oversee the administration of his or her court. In recent years, there has been an expansion in these administrative responsibilities. In addition, the chief justice is obliged to participate in a number of other bodies such as the Ontario Judicial Council, the Canadian Judicial Council and the Rules Committee.

It is the opinion of this Inquiry that great care should be taken not to overload the chief justice with administrative and other responsibilities. The chief justice should be the foremost judge of his or her court and be available to try the most difficult and most sensitive cases to the extent that the necessarily diminished sitting schedule of a chief justice permits. It is by this kind of performance on the firing line that the chief justice maintains the respect and loyalty of the members of his or her court. It is a principal function of a chief justice or chief judge to be a jurisprudential leader, a role model and a motivator of the members of the court. To the extent that he or she is burdened with other duties, the ability to fulfill the principal function of chief justice is diminished. **It is therefore recommended that, where necessary, the chief justice (or chief judge or associates) be provided with an administrative assistant.**

From the foregoing, it is obvious that the demands placed upon a chief justice are very great and require the expenditure of a very high degree of effort and energy. It is doubtful whether or not this kind of performance can be maintained for long periods of time. This Inquiry agrees with the conclusion reached by Chief Justice Deschênes in his report Masters in Their Own House that a chief justice should hold office for a fixed term, after which he or she should continue as a judge of the court.

There is nothing shocking in this view. In the academic community, university presidents and deans hold office for fixed terms and, upon expiration of those terms, return with grace and dignity to the professorial ranks from which they came. **This Inquiry therefore recommends that appointments to the office of chief justice (or chief judge or associates) be made for fixed terms of five years.**

10.4 TIMELINESS OF APPOINTMENTS

In the past, a number of judicial positions in both the superior and provincial courts have not been filled for very long periods of time. These long-standing vacancies disrupt court schedules and the orderly conduct of business. Substantial backlogs of cases accumulate and these backlogs do not disappear as soon as the vacancy is filled. It requires extraordinary effort to reduce these accumulations. There is no valid reason why vacancies should be left unfilled for any substantial period of time. Dates of retirement and supernumerary elections are known well in advance.

It is therefore recommended that both levels of government approach the issue of judicial appointments on a businesslike basis and that the issue be addressed well before vacancies arise. In this manner, vacancies should be filled either prospectively or at least immediately upon the occurrence of the vacancy.

10.5 JUDGES' TRAINING

It is a rare situation when a new appointee to the judiciary will be completely familiar with all of the issues with which he or she will be confronted. Lawyers tend to specialize. Even general practice is, in a manner of speaking, a form of specialization. The general practitioner will confine his or her practice to conventional cases and will not ordinarily handle murder cases or constitutional cases. The criminal specialist will, of course, be familiar with his or her specialty, but with little else. It is obvious, as well, that many issues that now occupy the time of the courts were not even on law school curricula 20 years ago.

There is a growing opinion that, upon appointment to the bench, new judges should go back to school for a short period of time. During this period, there should be basic instruction in those matters with which the appointees may not be totally familiar, such as the new regime with respect to family law, the Charter and basic evidentiary problems.

At present, there are efforts being made in this direction. A short seminar for new judges is conducted for those appointed by the federal government. The Canadian Judicial Council has also taken some steps in this direction.

It is the opinion of this Inquiry that what is needed is a very substantial increase in the training of new judges. It is proposed that in conjunction with one of the law schools, a course of two or three months duration be organized. Such a course would be administered by the law school. The teaching personnel should be recruited from the academic community and from the ranks of experienced judges and practitioners. Such a school for judges would have as its student body both provincial and federal appointees. It is appreciated that there are a number of problems associated with such a full time enterprise. When would such a course be held? How large would the student body be?

In Ontario, there are approximately 450 judges. As a result of deaths, retirements and supernumerary elections, approximately 30 to 40 new judges are appointed by both federal and provincial authorities in each year. However, these appointments trickle forth in a random fashion. If all of the appointments for a year were made at about the same time, some of them even prospectively, a sufficient student body could be assembled to make a new judges' course economically feasible. If the school is organized on a national basis, the class size would be, of course, much larger and could well create the need for two classes a year.

It is recommended that the Attorney General seek financial support from the federal government to establish a national program for the training of new judges. If, however, such support is not forthcoming from the federal government, it is recommended that the Ontario government establish its own educational program for judges. Regardless of who establishes it, this program should be organized in conjunction with a law school and it should be available to both provincial and federal appointees.

10.6 FORMS OF ADDRESS

Judges of the Court of Appeal and the High Court of Ontario are addressed as "my Lord" or "your Lordship". Judges of the District Court and the Provincial Courts are addressed as "your Honour". In 1969, Chief Justice Laskin, (then a member of the Ontario Court of Appeal), said in the Hamlyn lectures:

> Another tradition that was not originally adopted in Canada was the English form of address and entitlement of the superior court judges. They were "Your Honour" and "His Honour" in Upper Canada until the second quarter of the 19th century. This mode of address survived in New Brunswick into the 20th century notwithstanding a formal resolution of the Barristers' Society of that Province in the last quarter of the 19th to have the judges of its superior courts addressed as "My Lord," as was by then the custom in Ontario and elsewhere in Canada. So far as I have been able to determine, the present-day salutation of "Your Lordship" has no formal basis; it rests on exaggerated courtesy, and perhaps on an assumed enhancement of prestige to mark the superior courts off from the inferior county and district courts whose presiding officers are "Their Honours." I cannot forbear to note that

> a judge of the High Court of Australia is "His Honour" despite the fact that he may be knighted. A judge of the Supreme Court of the United States is also "His Honour" without the redeeming possibility of a title. It may strike others, as it strikes me, to be pretentious for Canadian society, which rejects titles of honour in the formal gift of the British monarch, that any class of judges should be addressed as "My Lord." [at 31]

Some traditional formalities continue to serve a useful purpose, such as the wearing of gowns which continues to enhance dignity in the courtroom. It is difficult, however, to conceive what purpose is served by this use of the salutation, "my Lord." The public is often confused and intimidated by the need to use this form of address. It is a vestige of an era long past. **This Inquiry recommends that members of the Ontario appellate courts and the Superior Court be addressed as "your Honour".**

10.7 CROWN ATTORNEYS

The Ontario Court of Appeal in Regina v. Savion and Mizrahi (1980), 52 C.C.C. (2d) 276 (Ont. C.A.) said,

> By reason of the nature of our adversary system of trial, a Crown prosecutor is an advocate; he is entitled to discharge his duties with industry, skill and vigour. Indeed, the public is entitled to expect excellence in a Crown prosecutor just as an accused person expects excellence in his counsel. But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice and it is appropriate at this point to recall the words of Rand, J. in Boucher v. The Queen (1954), 110 C.C.C. 263, [1955] S.C.R. 16, 20 C.R. 1 at p. 270 C.C.C., p. 23 S.C.R.:
>
> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see

> that all available legal proof of the facts is presented. It should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. [at 289]

This Inquiry, of course, endorses the view of the Court of Appeal. We wish, however, to approach the role of crown attorney on a somewhat narrower basis. Not only is the crown attorney the adversary for the public in the criminal justice system but he or she also plays an extremely important role in the overall functioning of the justice system.

We turn first to the most visible role of the crown attorney - the courtroom performance. Because of the very large number of cases handled by prosecutors, the skill and efficiency of the crown prosecutor becomes very important. A private lawyer who is inept or very slow can cause problems. But an inefficient crown prosecutor can cause problems to the system on a wholesale scale. It is therefore obvious that crown prosecutors should be knowledgeable and efficient courtroom advocates.

Outside the courtroom, the crown attorney also has a great impact on the courts. He or she exercises, or should exercise, control over the nature of the charges brought to criminal courts. Crown attorneys, in varying degrees, make disclosure of their case to defence counsel. Further, crown attorneys may agree to accept guilty pleas to lesser charges. All of these matters bear heavily on the workload of the courts. In addition to his being an able advocate, a crown attorney should discharge these latter functions with integrity and common sense.

In summary, good crown prosecutors make a substantial contribution to the efficiency and overall flow of cases through the system. Generally, the people of this province are well served by their crown prosecutors but there are a few issues which should be addressed.

Recently, too many experienced crown prosecutors (more than ten years experience) have resigned and have gone into private practice. It is the observation of this Inquiry that when an experienced crown prosecutor is replaced by one without experience, the caseflow slows down substantially. It is not the function of this Inquiry to deal specifically with the issue of salaries but there is no economy effected by declining to increase the salaries of experienced, efficient prosecutors and replacing them with those that are inexperienced and inefficient. Each dollar saved at the salary level is offset many times over by the additional cost burden imposed upon the justice system and the public.

Inevitably, replacements must occur because of retirement and promotions, but the Ministry of the Attorney General should not accept the routine departure of experienced prosecutors because of salary considerations.

In the larger centres, it appears that the number of crown prosecutors is inadequate. Elsewhere in this report, we have recommended that the crown attorney should play a larger part in the formulation of the charges to be laid. We have also recommended that crown attorneys be available to make disclosure to and discuss cases with defence counsel. In some of the larger centres (e.g. Toronto, Windsor), crown prosecutors have very little time if any left for these latter functions since they are obliged to be present in court for almost all of their available time. **It is recommended that the Attorney General's department scrutinize the number of crown attorneys available in the larger centres with a view to increasing their number so**

that they have enough time to adequately discharge their functions other than appearing in court.

10.8 PART TIME CROWN ATTORNEYS

In some areas of the province, large numbers of part time crown prosecutors are used. These part time prosecutors are selected from a panel of private practitioners. The practice of using part time prosecutors introduces wide variations in competence. Because of the brief periods of service, part time prosecutors cannot be fully effective. The police seldom consult part time crown attorneys. Major decisions, such as whether or not to withdraw a charge or accept a plea to a lesser charge, almost invariably require the approval of a full time crown prosecutor.

In some thinly populated areas of the province, there are part time prosecutors who serve on an almost continual basis and, as a result, are experienced and competent. It is recognized, as well, that even in large centres, emergencies will arise which will require the utilization of part time prosecutors. **It is the recommendation of this Inquiry that, to the extent possible, the use of part time crown prosecutors be discontinued.**

10.9 ADMINISTRATIVE PERSONNEL

In dealing with the people who operate the court system, there is a tendency to focus on the role of the professionals such as judges and lawyers. The high visibility of these actors in the system tends to overshadow the importance of the administrative personnel who attend to the details that make the system function. In Chapter 7, we have sought to emphasize the importance of administration in an efficient court system.

A reorganized and consolidated administration of the courts will require the best available people. With a view to recruiting the best people, there are measures that can be adopted to make courts administration a more attractive and rewarding career.

There should be a clear career path within courts administration. The most junior typist should be able to foresee at least the possibility of rising to the top of the courts administration pyramid. Promotion within courts administration should be based on merit alone. At present, there is a degree of vertical movement within the system. However, senior positions, such as sheriff and registrar, are customarily filled by order in council. Unfortunately, partisan politics often plays a part in these appointments. It must be obvious that this practice can only thwart the legitimate aspirations of those who wish to find a career in courts administration.

It is recommended that the practice of filling senior administrative positions by order in council cease.

There will, in future, be cases when those in charge of courts administration may find it necessary to recruit a talented person from outside the ranks of courts administration personnel. This kind of appointment, however, can be done within competitive guidelines.

10.10 EDUCATION AND TRAINING

In courts administration, there will no doubt be, as there has been in the past, a degree of on the job training. This practice should be continued. With the increasing complexity of management skills and technology, there are some aspects of courts administration that can be learned only in a more structured way. Excellent courses are offered at Brock University in St. Catharines and also in the United States.

Promising employees in the system should be encouraged to take these courses. It is not proposed, however, that this be done on a wholesale basis or that a tradition be developed whereby everyone feels that they are entitled to take a course by way of a sabbatical leave or thinly disguised holiday. Administrative personnel should be given leave of absence with pay on a competitive basis in which the criterion is merit alone to attend appropriate course. The employee would be expected to pay his or her own tuition and would be reimbursed only on satisfactory completion of the course.

This Inquiry is of the firm opinion that the age of the professional manager has arrived in courts administration and, to the extent possible, these professional managers should be developed from within the system rather than be recruited from the outside. This approach should produce a high morale and corresponding productivity within courts administration.

10.11 LEGAL RESEARCH - LAW CLERKS

It is an unfortunate aspect of modern law (both case law and statute law) that it has become complex and voluminous. In addition, secondary material, such as textbooks and scholarly writing, have all increased dramatically. With the enactment of the Charter, it is now increasingly necessary to look at the jurisprudence of other jurisdictions, notably the United States. It is therefore not surprising that in recent years judges have required research assistance.

Until 1986, the Court of Appeal employed Bar Admission Course graduates to work for a period of one year as clerks. Beginning in 1986, the Court of Appeal accepted as clerks, LL.B graduates who spent one year with the court. This one year period is credited by the Law Society as their period of articles. In 1986-87, nine such clerks were employed to assist 18 judges.

The High Court, comprised of 49 judges, employs 13 law clerks. All of them are graduates of the Bar Admission Course. The District Court employs a full time director of research and three law clerks who are graduate lawyers and who are hired for a period of one year. The Provincial Court (Criminal Division) employs a full time researcher and, during the summer, hires a number of law students. The Provincial Court (Family Division) also employs a full time researcher and summer students.

The greatest need for research help exists in the Court of Appeal and in the High Court. It is equally apparent that if the courts are reorganized as recommended in this report, considerable research help will be required by both the final and intermediate courts of appeal as well as by the Superior Court. At present, in the Court of Appeal and in the High Court, the system by which legal research is provided is inherently inefficient. Each year, there is a total turnover as the existing clerks go on to either private practice or the Bar Admission Course. Just as these clerks are becoming familiar with the job and acquiring a degree of expertise, they leave. It is apparent that the exercise is regarded as more of an educational experience for the law clerks than as a research adjunct to the court. It is to be further observed that during these one year periods, there is no single person who is charged with directing the affairs and work of the law clerks.

It is the conviction of this Inquiry that the courts can no longer afford to continue a clerk system whose primary function is the education of those clerks. The research requirements of the courts will be better met by creating a largely permanent research organization. It is the recommendation of this Inquiry that the research capacity of the various courts be consolidated and that in that consolidated facility full use be made of computer technology.

It is recommended that there be organized, at Osgoode Hall in Toronto, an office of legal research to be headed by a director. This office should be staffed by a number of graduate lawyers who are prepared to make a career of legal research or at least commit themselves for a period of two years. This core of staff lawyers should be supplemented by the employment of LL.B. and Bar Admission Course graduates. The LL.B. graduates will of course be willing to stay for a period of only one year. However, the Bar Admission Course graduates should be hired for periods of either one or two years as the candidate prefers. The total number of researchers and law clerks cannot be determined in advance but should be determined by the Courts Management Committee. The office of legal research should be available to serve all of the courts of Ontario. As a matter of day to day management, a suitable section of the office should be assigned primarily to the appellate courts and the balance to the trial courts.

It is recommended that in each region there be at least one staff lawyer, the legal research officer for the region, and that there should be assigned to this person one or more law clerks, either graduates of the LL.B. program or the Bar Admission Course. These regional offices should work in close cooperation with the central research facility in Toronto.

CHAPTER 11

Related Matters

11.1 OPEN COURTS

Section 145 of the Courts of Justice Act and s. 442 of the Criminal Code provide that trials and other proceedings be held in open court. Both sections confer power on judges to depart from the open court rule in exceptional cases. In addition, there are other statutes which empower courts to exclude the public (e.g. s. 39 of the Young Offenders Act). The news media have filed submissions asking that the exceptions to the open court rule should be kept to a minimum.

It is now clear that free access to the courts is a Charter right pursuant to s. 2(b) of the Canadian Charter of Rights and Freedoms. In Re Southam Inc. v. The Queen, No.1 (1983), 41 O.R. (2d) 113 (C.A.), the Ontario Court of Appeal held that free access to the courts "is an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression and in terms includes freedom of the press."

By virtue of the terms of the Charter itself, any departure from this rule can exist only if it is a reasonable limit that can be demonstrably justified in a free and democratic society. It appears, therefore, that with such a constitutional right, the news media need have no concern respecting the open court principle. The particular laws which restrict access to courtrooms will be, and have been, tested against the Charter (for example, see Re Southam Inc. v. The Queen, No.1 (1983), 41 O.R. (2d) 113 (C.A.); Re Southam Inc. v. The Queen, No.2 (1985), 16 C.C.C. (3d) 262 (Ont. H.C.J.)).

11.2 PUBLICATION BANS

The media are equally concerned about publication bans. As in the case of access to the courts, in general terms, the right of the media to publish is protected by constitutional guarantee. There are, of course, exceptions to this general rule where publication bans are necessary to protect the integrity of a trial or the safety of a witness. In the light of the constitutional guarantee, it is anticipated that publication bans will be used more sparingly in the future. It should be pointed out, however, that apart from the Charter, courts do not have, and never had, unlimited power to ban publication (see Re Regina v. Unnamed person (1986), 22 C.C.C. (3d) 284 (Ont. C.A.)). Unfortunately, errors are sometimes made and courts will issue publication bans when they should not, and the news media are obliged to resort to appellate courts in the same fashion as any other disappointed litigant. In summary, there is no need for any recommendation by this Inquiry for any change in the existing law with respect to openness of the courts or publication bans.

11.3 ACCESS TO DOCUMENTS

Section 147 of the Courts of Justice Act provides for public access to court documents unless there is a court order or statutory authority to the contrary. In Attorney General of Nova Scotia v. MacIntyre (1982), 132 D.L.R. (3d) 385 (S.C.C.), the Supreme Court of Canada subscribed to the principle of maximum accessibility to court documents in criminal cases, but not to the extent of harming the innocent or impairing the efficiency of the process (in that case, a search warrant). Drawing the line between public accessibility and other legitimate policy considerations which mitigate against public accessibility is an extremely difficult and delicate task. This Inquiry is of the opinion that there is insufficient reason to warrant a recommendation that the existing law be changed.

However, this does not end the problem. It is the conclusion of this Inquiry that problems are experienced by the public and representatives of the news media alike who seek to inspect court documents. These problems do not arise because of the state of the law. In the overwhelming number of cases, problems exist when the public and the media are denied access to documents that plainly should be available to the public and are not covered by any exceptional rule. The problem exists because court staff in the justice system are simply not sufficiently aware of the public character of most of the documents within their care. As a result of excessive caution, accessibility is denied.

It is therefore recommended that the Ontario Courts Management Committee provide all of the administrative offices with a clear statement respecting the public character of the documents within the court system and list the exceptions (adoption papers, unexecuted warrants, etc.).

Further, it should be publicized that the regional courts management committees and the regional court manager are the targets for any complaint by those who feel they are being improperly denied access to court documents. It should be observed, however, that court offices are busy places and those who wish to inspect public documents should know within reasonable limits what they wish to see and not expect administrative personnel to conduct searches for them.

11.4 THE ELECTRONIC MEDIA IN THE COURTROOM

Section 146 of the Courts of Justice Act provides as follows:

> 146(1) Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing; or

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a).

(2) Nothing in subsection (1),

(a) prohibits a person from unobtrusively making handwritten notes or sketches at a court hearing; or

(b) prohibits a solicitor or party acting in person from unobtrusively making an audio recording at a court hearing that is used only for the purposes of the litigation as a substitute for notes.

(3) Subsection (1) does not apply to photograph, motion picture, audio recording or record made with authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the court hearing;

(b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves.

> (4) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both.

This Inquiry has received a brief from the Radio-Television News Directors Association of Canada advocating the substantial repeal of s. 146 and the admission of the electronic media into the courtroom. It is not a part of this submission that the ambit of the public trial be expanded but simply that trials, or parts of trials that are now public, be exposed to radio and television coverage.

Section 146 has been challenged on the grounds that it contravenes ss. 2(b) and 11(d) of the Canadian Charter of Rights and Freedoms (see R. v. Squires, No.2 (1986), 25 C.C.C. (3d) 44 (Ont. Prov. Ct.)). Thus far, the constitutional challenge has failed.

11.5 ARGUMENTS IN FAVOUR OF ADMITTING ELECTRONIC MEDIA INTO THE COURTROOM

The argument in favour of admitting the electronic media to the courtroom is as follows. It is part of our tradition, now enshrined in the Charter, that trials are held in public. In a modern, largely urban society, physical access to the courtroom by the public is no longer as simple or convenient as it once was. Today, the public exercises its right to see and hear through the electronic media and therefore the electronic media should be permitted in the courtroom, in effect as the eyes and ears of the public.

Presently, the perception of the justice system in the minds of the public is largely created by television fiction which portrays the workings of the courts in a manner that has little relationship to reality. Additionally, it is said that most of the fictionalized courtroom adventures that are shown to the Canadian public are American and seldom accurately portray what transpires even in American courtrooms. Our justice system will endure and command the respect and confidence of the people only if it is understood by its ultimate masters, the people. Legal literacy in a modern world can be advanced best by the most pervasive media: radio and television. The early resistance to electronic coverage of trials may have been legitimate because of the state of the technology. Extra lighting, a tangle of cables and the presence of a number of technicians in the courtroom are no longer necessary.

In the United States, after an initial rebuff (see Estes v. Texas (1965), 381 U.S. 532 (U.S.S.C.)), television coverage was held not to violate the Constitution in Chandler v. Florida (1981), 101 S.Ct. 802 (U.S.S.C.). It is now said that 43 of the 50 American states permit electronic access to the courtroom on either a permanent or an experimental basis. So far, it does not appear that the dire predictions as to the effect of the electronic coverage have been borne out. In recent years, radio and television coverage have entered the House of Commons, the provincial Legislature and even municipal council chambers. A number of royal commissions (e.g. the Grange Commission on the Toronto Hospital for Sick Children, the Estey Commission on banking, the Parker Commission on conflict of interest allegations) have all been the subject of electronic news coverage with no apparent ill effect. A great many witnesses have testified at all of these commission hearings and whatever notoriety may have been visited upon any of the witnesses has been very fleeting and bears out at least part of the prophecy of Andy Warhol, that in the future everyone will be famous for 15 minutes.

11.6 ARGUMENTS AGAINST ADMITTING ELECTRONIC MEDIA INTO THE COURTROOM

There is, however, a substantial and respectable body of opinion that opposes the admission of the electronic media into the courtroom. The arguments can be summarized as follows. Electronic coverage will interfere with a fair trial in that it will turn the participants into actors. Witnesses will be less likely to come forward and be willing to participate in the administration of justice if they know they will be the subject of radio and television coverage.

The concept of the public trial will be inordinately magnified. Public simply means that the trial is not secret and that the door is open to those who wish to enter. The concept of public does not mean that the trial participants should be subject to being watched by thousands or even millions of people. Electronic media coverage carries no real benefits by way of public education. The electronic media coverage will simply be used to provide 15 or 30 second news clips which will distort the picture of the trial rather than contribute to any public understanding. Representatives of the electronic media have no basis for complaint on the grounds that they are excluded. They are presently entitled to enter the courtroom and to watch and listen and then report to the public via the electronic media in exactly the same fashion that reporters from the print media watch and listen and then report their impressions to the public via the written word.

None of the arguments can be dismissed out of hand. They each proceed on the basis of conscientious conviction and the adherence to principle. What is lacking, however, is empirical data.

In Ontario, in 1980, Chief Justice Howland convened a committee to explore ways of improving the court reporting of court proceedings in the press. One of the issues touched on was the admission of television cameras into the courtroom. Media participation was invited and, as a result of a number of meetings, videotape recordings were made of the proceedings in a variety of courts ranging from the Ontario Court of Appeal to traffic courts and the tapes were broadcast. These experimental steps were taken within the ambit of s. 67 of the Judicature Act (the forerunner of s. 146 of the Courts of Justice Act). The videotape recordings proceeded without any serious problems and were conducted in accord with a set of guidelines prepared by the Radio and Television News Directors Association. These guidelines are proposed now as a model to regulate future electronic coverage (see Appendix 8). However, in 1983, the Canadian Judicial Council passed a resolution that "television should not be allowed in court proceedings." This resolution had the effect of terminating the Ontario experiments and any movement towards amending the law. It is unfortunate that the Ontario experimental steps were terminated at this early stage. A continuation of the experiment would have provided a great deal of helpful material that would have gone a long way towards resolving this dispute.

It is recommended that s. 146 of the Courts of Justice Act be amended to permit the electronic media into the courtroom for a period of two years. The media coverage should conform to the RTNDA model guidelines. At the conclusion of the two year period, the experience can be evaluated and, in the light of that experience, a recommendation can be made for the continuation of electronic coverage either with or without modifications, or its abandonment.

11.7 TAPE RECORDERS IN THE COURTROOM

This Inquiry has also received submissions from the print media that s. 146 be amended to permit reporters to use tape recorders in the courtroom. It would follow, of course, that if electronic media are allowed in the courtroom, there can hardly be objection to the use of tape recorders. It is, however, of some importance that this submission be considered separately. Peter Calamai, as Max Bell professor of journalism at the University of Regina, did a study on the accuracy of quotations taken by newspaper reporters at the trial of Colin Thatcher. The results indicated a high degree of inaccuracy. The submission of the print media is that tape recorders be used simply as a tool to ensure accuracy and not for broadcast.

It is recommended that s. 146 of the Courts of Justice Act be amended to permit the use of tape recorders in the courtroom as a method of taking notes. This amendment should be permanent and not tied to the two year experiment respecting the electronic media. Ultimately, of course, it is possible that this amendment will be subsumed into an amendment dealing with the electronic media but, for the time being, it deserves separate recognition.

11.8 COURT REPORTING

It is axiomatic in a court of record that a record of proceedings be kept. The Ontario Evidence Act, s. 5(1), provides as follows:

> 5.(1) Notwithstanding any Act, regulation or the rules of court, a stenographic reporter, shorthand writer, stenographer or other person who is authorized to record evidence and proceedings in an action in a court or in a proceeding authorized by or under any Act may record the evidence and the proceedings by any form of shorthand or by any device for recording sound of a type approved by the Attorney General.

While courts keep records, it is only occasionally necessary for the record to be converted into a typewritten transcript. All or part of the transcript of a trial will be necessary for an appeal. The transcript of preliminary hearings is almost always required for trial. Other proceedings, such as examinations for discovery and the examinations of witnesses, require transcripts for use at trial.

The production of written records, such as transcripts, plays an important role in the justice system. Some transcripts of evidence are very long and significant delays are caused by the time required for the preparation of this material. The delay problem is particularly noticeable in cases that are appealed. It is necessary for an efficient justice system that transcripts be produced as quickly and as economically as possible.

11.9 COURT REPORTERS

Presently, court reporters are assigned to particular courts and even to particular judges. In the High Court, court reporters are obliged to travel the province on the circuit with the High Court judge to whom they are assigned. Some court reporters are permanent employees of the Ministry of the Attorney General but a great many are freelance reporters who are paid on a per diem basis. The resort to per diem court reporters is caused by the fluctuating demand for court reporting services.

With the reorganization of the court structure and the elimination of the province-wide circuit, it follows that some changes can be made in the way in which court reporting services are supplied. With the integration of courts administration, it follows that court reporters need not be permanently designated or assigned to a particular court but should be pooled and assigned to courts as the business of those courts require. This is not to suggest that all court reporters will be the same. The differences, however, will be differences in qualifications and years of service. The most qualified will be assigned to the most demanding tasks, and of course should be paid accordingly. At this point, it is perhaps appropriate to observe that this Inquiry has received a submission from the court reporters which has been very helpful. However, parts of the submission have dealt with licensing, standards of qualification and rates of pay. It is the view of this

Inquiry that these matters are not properly within the ambit of this Inquiry and may be more properly dealt with by the Courts Management Committee.

Court reporting services will, of course, be provided to the Provincial Court on a local basis. Similarly, during the phase-out period, local court reporting services will be provided to the District Court. **It is recommended as well that, whenever possible, court reporting services be provided to the Superior Court locally rather than oblige a court reporter to travel with the judge within a region.**

11.10 SHORTHAND METHOD OF COURT REPORTING

Presently, in Ontario, there are four methods of court reporting. Shorthand reporting is the original method of court reporting and is the most demanding. To produce a transcript, the reporter either types from shorthand notes or dictates from shorthand notes onto tape and the tape is in turn transcribed by a typist. There are obvious problems with this system. The number of competent shorthand reporters is declining because of a lack of inclination to take up this career. Additionally, the shorthand system is a personal system. It is only the reporter who can either type or dictate from his or her own shorthand. This latter factor creates serious bottlenecks in the event that a single reporter is asked for the transcript of a number of trials. And if a reporter should become disabled, the record may be lost entirely.

11.11 STENOTYPE - CAT SYSTEM OF COURT REPORTING

This is a system whereby the reporter uses a shorthand machine to produce symbols on a paper tape. The reporter can either type directly from the machine-produced tape or dictate from the paper tape onto a recording tape which in turn can be given to a typist. To this point, the stenotype system is similar to manual shorthand except that it uses a machine. The stenotype system, however, can be used in conjunction with a computer which can translate the shorthand symbols into text. This method of producing transcript is popularly referred to as the computer-assisted transcript system or the CAT system. This system can be used to produce a written transcript almost immediately. It can also display written transcript on a video-display terminal concurrently with the proceedings. This system can store the material on a computer disk and the transcript can be produced very quickly at a later date. Those who require a transcript can either buy the written transcript or obtain a copy of the transcript in disk form which can be used in conjunction with computers in the office of the person who buys such a service. There are other advantages to the CAT system; in association with other computers, the record can be searched very quickly to find specific matters.

11.12 THE STENOMASK METHOD OF COURT REPORTING

This system is one in which the reporter repeats the evidence into a tape recorder and maintains a written log. The tape may be transcribed by the reporter or by a typist.

11.13 OPEN MICROPHONE METHOD OF COURT REPORTING

This is, as the name implies, a system whereby the voices of those involved in the court proceeding are simply recorded directly by electronic means. Multiple microphones and multiple track tape can be used to record the voices of all participants, at the same time, if necessary. This system has the advantage of requiring very little training for the operator and is becoming widely used in the courts in Ontario. A monitor is usually used to ensure that the system is working and to prepare a log. As technology increases, however, the need for monitoring may diminish and it is at least possible that the monitoring function can be performed by the court clerk. A transcript can be prepared from the electronic tape either by the monitor, if he or she is capable of doing so, or by a typist.

11.14 CONCLUSIONS RE METHODS OF COURT REPORTING

It is the opinion of this Inquiry that the CAT system of court reporting is obviously the superior method and its use should be encouraged. It is fast, reliable and is now more reasonably priced. It does, however, require very skilled operators. The CAT system has made some inroads into Ontario but is not widely used because of the scarcity of skilled operators and uncertainty surrounding the future of court reporting and the reluctance of some court reporters to invest in the new technology.

Inasmuch as the court reporters sell the transcript and keep the proceeds, it is generally thought that the reporters should themselves invest in the technology to produce the transcript.

On the other hand, it seems apparent that such a sophisticated system should be used only when there is a reasonably high demand for the production of transcript. In some courts, although courts of record, the need to produce a written transcript seldom arises. In courts where transcript is seldom necessary, it appears that a simple, open microphone system would be sufficient. With the advances in technology, it is difficult to see any place for the other two forms of court reporting and they should be phased out. The shorthand method requires skilled personnel but remains slow and inefficient. The stenomask system also seems to have been overtaken by technology. Recording equipment now is easily capable of directly recording the voices of the participants without the necessity of an intermediary.

This Inquiry recommends that the courts of Ontario utilize the CAT system and the open microphone system. The

determination of which system should be used in which courts should be made on businesslike principles. In those courts in which it is likely that a transcript will be required (many of the cases in the Superior Court and preliminary hearings in Provincial Court), the CAT system should be used. In cases in which transcript is not likely to become necessary (for example, civil cases in Provincial Court, Provincial Offences Court, etc.), the open microphone system should be used. Those charged with the management of the courts can make this determination on the assessment of demand.

CHAPTER 12

Conclusion and Summary of Recommendations

12.1 CONCLUSION

In the foregoing chapters, this Inquiry has made a great many recommendations, calculated to rationalize and simplify the justice system in Ontario. The principal objective throughout this report has been to move the justice system closer to the people whom it serves. We have thought it essential that, in those cases which touch all of our lives with increasing frequency, one should be able to exercise one's access to the justice system quickly, economically and expeditiously. In practical terms, this means that in our matrimonial difficulties, our disputes respecting goods, services and shelter, the transgressions of regulatory laws and other such cases, we must be able to exercise our right to justice without large expense, waste of time by litigants and witnesses alike, or unnecessary emotional trauma.

In the system proposed by this report, family disputes of any nature or size would go to a single court. That court would have mediation resources available (even before litigation began), and would have simple, expeditious, low cost procedures. Smaller civil cases could be brought before a court with quick, straightforward procedures and a non-adversarial approach like that of the family court. Criminal cases would proceed faster and without unnecessary appearances in court before trial. All the courts up to the Court of Appeal would be available in all regions of the province.

To some, the justice system is a remote institution whose existence is known only by the cases that catch the attention of the mass media. There will, of course, always be "big cases" in the justice system which, because of their notoriety or importance are the subject of wide interest and become public spectacles. These spectacular cases, however, tend to distort our perception of the administration of justice, and it is wrong to regard the courts as a distant sensational institution of marginal relevance. The justice system is not a spectator sport involving only a very few, which the rest of us watch with varying degrees of interest and amusement. The justice system is a participatory enterprise in which directly or indirectly we all have a very large stake, and in which we will all be called eventually to take part, as victim, witness, party or juror. We have tried throughout this report to emphasize and facilitate this right to participate by recommending a simpler structure of courts, a more efficient management of them and a more prudent use of the system.

Having said all of this, however, some reality must intrude. This is not the first inquiry into the justice system. There have been others, and many of them have simply gathered dust. In Chapter 7, this Inquiry encouraged those who manage the courts take the advice of Peters and Waterman's In Search of Excellence and, "...Do it, fix it, try it..." [at 134]. We noted that they should not be paralysed by a fear of failure. This same attitude holds true for the reform of the courts. Nothing will be achieved or improved if nothing is tried. We have attempted to make it clear in this report that the time for action is at hand. The system is in danger and reform must not wait.

If some of the recommendations in this report do not find favour with the governing authorities, then other recommendations should be devised and implemented promptly. It would be wrong to confuse action with an endless circle of further studies, analyses, and reports which would likely do little more than lead to an eventual paralysis. At this point, we would do well to recall an ancient teaching:

> God is urgent about justice, for upon
> justice the world depends...
> (EXODUS Rabbah Mishpatim 30:19, 24)

12.2 SUMMARY OF RECOMMENDATIONS

CHAPTER 5

GENERAL PRINCIPLES

1. Government should assess the cost of implementing legislation which will affect the courts as part of the cost of the legislation itself.

2. The courts should be properly funded.

3. The principle that courts exist for the benefit of litigants and the public must be kept in mind whenever reform or restructuring of the courts is under consideration.

4. When new buildings are required both the courthouse and the courtrooms should be designed with handicapped parties, witnesses, lawyers, judges and spectators in mind.

5. All courts and court offices should be housed in a single building.

6. The Provincial Court should be present in the smaller centres of Ontario and should also provide service to the remote centres of Ontario.

7. In order to help the public understand the courts, information pamphlets, signs, and court personnel should be provided to help the public find their way around the courts.

8. The court system should be economically accessible to people of all income levels.

9. The speed with which criminal cases are tried should be recognized as important, not only to the immediate parties, but also to the public at large.

10. If counsel is unable to accept a trial date within a reasonable time because of conflicts in his or her own schedule, he or she must arrange for substitute counsel or withdraw from the case entirely.

11. A period of training should be offered to all court personnel, particularly if the person appointed is to fill a significant post.

12. Despite the fact that there must be inefficiencies in the court system, constant inefficiencies should not be accepted as the hallmark of the justice system.

CHAPTER 6

PROPOSED STRUCTURE OF THE ONTARIO COURTS

13. The needs of the people of Ontario will be best served by a two level court system consisting of a superior court of general jurisdiction, with judges appointed by federal authority, and a local court system of special or limited jurisdiction, with judges appointed by provincial authority.

LOCAL COURT OF LIMITED JURISDICTION

14. The Provincial Court should be reorganized as a single local court with criminal, civil and family jurisdiction. It should also function as a youth court.

15. There should be a single chief judge of the Provincial Court, and there should be seven associate chief judges of the Provincial Court - one for each region in the province.

16. The civil jurisdiction of the Provincial Court should be increased to $10,000 throughout the province.

17. In the event that there is any substantial delay in the implementation of recommendation #16, the declining value of the dollar should be recognized and the power to increase the monetary jurisdiction of this court, by regulation or by automatic indexing, should be built into the legislation.

18. On the consent of the parties, a matter beyond the monetary civil jurisdiction of the Provincial Court may be heard in that court.

19. The province should seek an amendment to s. 96 of the Constitution Act permitting the province to appoint judges to hear landlord and tenant cases.

20. It is desirable that ultimately all of the civil work in the Provincial Court be handled by Provincial Court judges. Additional Provincial Court judges should be appointed throughout Ontario to handle civil matters. There will, however, be a period of transition and, during this time, District Court judges should continue to be empowered to sit in the Provincial Court to hear civil cases in the same manner as they are now doing and have done for many years.

21. The use of deputy judges should be continued for a transitional period, but with some modifications. Only a small number of deputy judges should be used in each court until the transformation of the Provincial Court is complete.

22. The Provincial Court, in the exercise of its civil jurisdiction, should sit in both the large and small communities in Ontario and should not be centralized in only the county or district town. The details with respect to the number of places of sittings should be determined by the regional Courts Management Committee.

23. The printed form "fill in the blanks" type of pleadings now used in the Provincial Court should continue to be used even though the monetary jurisdiction has been increased.

24. Any award of costs in the Provincial Court should be confined to out of pocket expenses for the costs of filing and serving claims, witness fees and the like.

25. The criminal jurisdiction of the Provincial Court should be enlarged to correspond with the criminal jursidiction of the Provincial Court of Quebec so that the majority of all judge alone trials can be heard in the Provincial Court.

26. The whole Provincial Court should be designated a youth court and any judge of that court should be empowered to hear cases pursuant to the Young Offenders Act.

27. Serious and difficult cases in the Provincial Offences Court should be tried by Provincial Court judges.

28. The associate chief judge of the Provincial Court for each region should act as the co-ordinator of the justices of the peace within that region.

FAMILY COURT

29. There should be a unified family court for the province of Ontario, which should form part of the Provincial Court system. This arrangement would make justice in family law matters more accessible (economically, geographically and intellectually) to the people of Ontario.

30. The province should seek a constitutional amendment to permit the province to appoint judges with full power to deal with family law matters, and the power of a unified family court should be conferred upon the Provincial Court.

31. The judges of the Unified Family Court in Hamilton who do not wish to become part of the Provincial Court should be assigned to the District Court.

SURROGATE COURT

32. The Surrogate Court should be abolished and the jurisdiction of the Surrogate Court should be assigned to

the Provincial Court.

33. The concurrent power of the High Court of Justice in surrogate matters should be continued in the Superior Court and any contentious matters should continue to be removed to the Superior Court. The exclusive jurisdiction of the High Court of Justice to construe wills and give directions to executors should be continued in the Superior Court.

SIZE OF THE PROVINCIAL COURT

34. Increases in the judicial complement of the Provincial Court should be made only after it is apparent that all of the resources of the Provincial Court are being used to maximum advantage.

SUPERIOR COURT OF GENERAL JURISDICTION

35. The High Court of Justice should become the single s. 96 trial court for the province.

36. The court should be enlarged to a membership of 100 and should be organized along regional lines.

37. Within each region the sittings of each judge should be rotated in such a way that each community within the region is exposed to a variety of judges. However, there should not simply be mini circuits within each region patterned after the present circuit system. The judges should be rotated only when necessary to serve the needs of the region rather than on a ritual pattern which may be inconsistent with efficient case management.

38. Legislation should provide that the judges of the court be required to live within the region to which they are assigned unless otherwise authorized by the Courts Management Committee.

39. In each region there should be an associate chief justice of the court who will direct the activities of the court.

40. The court of general jurisdiction should be named the Superior Court of Ontario, a name which accurately reflects its position and function.

41. The Superior Court should be separately constituted and should no longer be simply a branch of the court which includes the appellate court.

ABOLITION OF THE DISTRICT COURT

42. The District Court should be abolished.

43. Beginning forthwith, there should be no further appointments to the District Court bench. This should be arranged in co-operation with the federal government, and provincial legislation should be passed which simply reduces the number of judges in the District Court as judges retire or accept other appointments. This process of reduction will culminate in the disappearance of the District Court.

44. The appointing authorities should look first to the members of the District Court when increasing the complement of the Superior Court.

45. When the offices of Chief Judge and Associate Chief Judge of the District Court fall vacant no new appointments should be made to these offices. The duties of the Chief Judge of the District Court should be simply assigned to the Chief Justice of the Superior Court.

46. The District Court judges should continue to be local judges of the High Court and they should perform such duties as may be assigned to them in that capacity by the Chief Justice of the Superior Court.

47. All of the statutory duties of the District Court should be assigned to the Provincial Court as part of its civil jurisdiction. If, on a detailed review of these statutes, it is found that any one of the statutory duties is of particular or unusual importance, then that statutory duty should be assigned to the Superior Court.

FAMILY LAW COMMISSIONERS

48. The family law commissioners should be offered appointments as Provincial Court judges, with a view to devoting most of their time to the hearing of family law cases.

INTERMEDIATE COURT OF APPEAL

49. The Divisional Court, which is already an appellate court, should be converted into the intermediate court of

of appeal for this province.

50. It is considered essential that the intermediate court of appeal should be constituted as a separate court, with permanent appointments and its own chief justice.

51. The name, Divisional Court, while of historical significance, means little or nothing to the public. The name of the new intermediate appellate court should be changed to the Court of Appeal.

52. The jurisdiction of the new Court of Appeal should include all appeals, both civil and criminal, which are heard by either the existing Court of Appeal or the Divisional Court.

53. The new Court of Appeal should sit in all of the regions in the province as the volume of business requires.

54. The new Court of Appeal should sit in panels of three judges.

55. At least in the beginning, the new Court of Appeal should be made up of a chief justice and 24 judges.

56. The best talent pool from which to draw appointees to the new Court of Appeal is the present High Court of Justice, and it is recommended that appointments should be made from the High Court of Justice.

57. The office of chief justice of the new Court of Appeal should be offered to the Associate Chief Justice of Ontario.

FINAL COURT OF APPEAL

58. The present Court of Appeal should be converted into the final court of appeal.

59. The active final court should be composed of: the Chief Justice of Ontario, and six judges of the existing Court of Appeal designated by the Chief Justice of Ontario on a yearly rotational basis. In a court of such diminished size, there would be no need for an Associate Chief Justice of Ontario. When that office becomes vacant it should be abolished.

60. All of the judges of the final court of appeal should be ex officio members of the intermediate court and should be assigned to the intermediate court during those periods in which they are not assigned to the final court.

61. The final court of appeal should be given the name of "Supreme Court of Ontario".

62. An appeal should lie from the new Court of Appeal to the Supreme Court of Ontario only with leave of the final court. The legislation providing for the further appeal to the final court should be phrased in general terms and it should be left to the final court to develop the criteria for leave.

63. It is recognized that there will be a very small number of cases whose exceptional quality is so obvious that the intermediate Court of Appeal should be bypassed. Therefore,

i) in exceptional cases, the new Supreme Court of Ontario should have power to order that an appeal bypass the new Court of Appeal and proceed directly to the final court; and

ii) where there are conflicting decisions by different panels of the new Court of Appeal on a matter involved in a proposed appeal, the Court of Appeal itself should be able to order that the appeal proceed directly to the new Supreme Court of Ontario.

64. In the hearing of appeals, the new Supreme Court of Ontario should sit either as a full court or as a panel of five, but in no case as a court of only three judges. However, in hearing motions for leave to appeal, the court should sit in panels of three judges.

65. Section 19 of the Courts of Justice Act should be amended to provide that the references referred to in that section be heard by the new Supreme Court of Ontario.

66. Section 617 of the Criminal Code should be amended to provide that in Ontario the references referred to in that section should be heard by the new Supreme Court of Ontario.

CHAPTER 7

THE MANAGEMENT OF THE COURTS

67. An Ontario Courts Management Committee should be established, comprising the Chief Justice of Ontario, the Chief Justice of Appeal, the Chief Justice of the Superior Court, the Chief Judge of the Provincial Court, the Senior Master, the Deputy Attorney General, the Assistant Deputy Attorney General responsible for courts administration, the senior official within the Courts Administration Division of the Ministry of the Attorney General, a representative of the bar and a representative of the general public. The Chief Justice of Ontario should chair the committee.

68. The committee should be responsible for setting operational policies for all the courts and provincial standards for the operations of the courts, subject to,

- i) the ultimate authority of the judiciary in matters relating to the assignment of judges, sitting standards for judges, assignment of particular cases and the establishment of sitting schedules; and
- ii) the ultimate authority of the government of Ontario in matters relating to the budget for the courts, remuneration and working conditions for provincial employees and the geographic locations in which court services are to be provided.

69. The Ontario Judicial Council should be reconstituted to comprise the Chief Justice of Ontario, the Chief Justice of Appeal, the Chief Justice of the Superior Court, the Chief Judge of the Provincial Court, an Associate Chief Judge of the Provincial Court named by the Attorney General, the head of the Law Society and two representatives of the public. The Senior Master should be added for matters involving a master.

REGIONAL STRUCTURE

70. The province of Ontario should be divided into seven judicial regions, as follows:

- i) North region - Districts of Kenora, Rainy River, Thunder Bay, Cochrane, Algoma, Sudbury, Manitoulin, Timiskaming, Parry Sound and Nipissing.
- ii) East region - Counties and Regional Municipalities of Hastings, Prince Edward, Lennox and Addington, Renfrew, Frontenac, Lanark, Leeds and Grenville, Ottawa-Carleton, Stormont, Dundas and Glengarry and Prescott and Russell.
- iii) Central East region - Counties, Districts and Regional Municipalities of Northumberland, Peterborough, Haliburton, Durham, Victoria, Muskoka, Simcoe and York.
- iv) Toronto region - Municipality of Metropolitan Toronto.
- v) Central West region - Counties and Regional Municipalities of Peel, Halton, Dufferin, Wellington, Grey and Bruce.

vi) Central South region - Counties and Regional Municipalities of Waterloo, Brant, Hamilton-Wentworth, Haldimand-Norfolk and Niagara.

vii) South West region - Counties of Huron, Perth, Oxford, Elgin, Middlesex, Lambton, Kent and Essex.

71. The seven regions proposed above should be adopted for all the courts of Ontario, the Courts Administration Division of the Ministry of the Attorney General, the crown attorney system, the Director of Support and Custody Enforcement and, if possible, all others intimately involved in the administration of justice, such as the Ministry of Correctional Services and the Ontario Provincial Police.

72. The regional structures of the three divisions of the Provincial Court, the Provincial Offences Court and the District Court should be modified immediately to coincide with the regions recommended above. Further, judges of the existing Supreme Court should be offered the opportunity to be assigned immediately to one of the seven regions.

73. The regional boundaries should be capable of being changed by regulation, and the suitability of the regional boundaries should be examined at least every five years.

74. A Courts Management Committee should be established for each region, comprising the regional head of the Superior Court, the regional head of the Provincial Court, the regional head of the Courts Administration Division of the Ministry of the Attorney General, a representative of the bar and a representative of the general public. The committee should be responsible for actual operations of all the courts in the region, subject to the authority of the Ontario Courts Management Committee in matters of policy and provincial standards, and subject to the authority of the judiciary and the government of Ontario in the matters referred to in recommendation 68.

75. Each of the seven regions should comprise a single judicial district, but hearings should continue to take place in the various existing judicial centres within a region as often as necessary to dispose of the business in that centre, and in any event at least twice a year.

76. The regional structure should be sufficiently flexible to allow for the transfer of cases from a judicial centre in one region to a neighbouring judicial centre in another region.

77. In each of the seven regions, there should be an associate chief judge of the Provincial Court and an associate chief judge of the Superior Court. The associate chief judge should have the power, which should be exercised

after appropriate consultation with the bench and after discussion with the regional Courts Management Committee, to assign judges to court locations within the region, assign individual cases to individual judges, determine the totality of workload for individual judges and determine sitting schedules.

THE JUDICIARY

78. Because of the leadership and management functions of the regional associate chief judge, appointments to this position should be made on the basis of superior aptitude for or demonstrated ability in judicial service and in management.

79. The judiciary should undertake a periodic, systematic evaluation of the performance of judges with a view to aiding judges to improve their performance and aiding the senior members of the judiciary in the assignment of judges.

80. The sitting year for a judge should consist of 44 weeks including judgment weeks and judicial training courses approved by the regional associate chief judge.

81. The normal sitting day for an appellate court judge should be four hours; for a Superior Court judge, four and one half hours; for a Provincial Court judge, five hours; for a justice of the peace, six hours.

CASE SCHEDULING

82. The scheduling of cases in the Provincial Offences Court and Provincial Court should be staggered at intervals of approximately two hours through the working day, commencing no later than 9:30 a.m. and extending late into the afternoon. The regional Courts Management Committees should conduct experiments in case scheduling to find methods that offer both convenience to the public and efficiency in operation of the court system, with convenience to the public always prevailing.

83. Evening and Saturday sittings should be considered by each regional Courts Management Committee for the Provincial Court and Provincial Offences Court and pilot projects should be undertaken in each of the seven regions to determine demand. Extended court office hours should also be considered and tried out on the same basis.

84. The judges of the Superior Court should be rotated only to the extent necessary to ensure a measure of variety of experience for any particular judge and to expose each community to a variety of judges.

85. Judges of the Provincial Court should be rotated from centre to centre for the same purposes as those of the Superior Court, although rotation may be expected in the Superior Court to a greater extent, at least initially.

86. All courts should conduct all lines of business (with the possible exception of jury trials) throughout the year, while making appropriate accommodations for the convenience of parties, witnesses and counsel.

87. Where the workload warrants it, judges should be assigned to sit as often as possible in teams.

SERVICE TO THE PUBLIC

88. The summons served on witnesses should be written in clear, plain English and should give adequate instructions to the witness concerning exactly where and when his or her attendance will actually be required. Witnesses whose attendance at the court causes them economic loss should be provided with real compensation (though not necessarily a complete indemnity). Scheduling and notification practices should be improved so that witnesses are given sufficient advance warning of when their attendance will be required and when an adjournment is expected.

89. An experiment should be tried with the summoning of jurors to hold themselves ready to attend at the courthouse on receipt of a telephone call from the sheriff's office on the day before they are actually required, without the necessity of attending at the courthouse unless and until a jury is to be selected.

90. Appointments and assignments of French speaking members of the judiciary (including masters) should be made so that there is someone available on short notice in areas with a significant francophone population, and someone available on reasonable notice in the rest of the province, to hear motions as well as trials and applications in the French language.

INTEGRATION OF THE ADMINISTRATION

91. Management of the administration of all the courts in Ontario should be integrated at the field level and at the head office level. This would mean that in each region, there would be a regional courts manager in charge of the administration of all courts operating in the region.

92. The administration of the courts of Ontario should be integrated and rationalized so as to deliver service to the public in any manner that provides efficient service. Statutory requirements that there be a sheriff, registrar, clerk or other officer in particular locations should be

repealed.

93. The office of bailiff of the Provincial Court (Civil Division) should be abolished and its functions assumed by the office of sheriff. Existing appointments of bailiffs should be terminated on reasonable notice, and arrangements should be made to engage such of the former bailiffs as are needed in appropriate positions in the sheriffs' offices.

93. The office of bailiff of the Provincial Court (Civil Division) should be abolished and its functions assumed by the office of sheriff. Existing appointments of bailiffs should be terminated on reasonable notice, and arrangements should be made to engage such of the former bailiffs as are needed in appropriate positions in the sheriffs' offices.

94. The provision of court reporting service to all the courts should be integratead within the Courts Administration Division of the Ministry of the Attorney General, and reporting services should be provided locally within each region as required.

COURT SECURITY

95. The provision of court security should be the responsibility of a provincial police force operating at the direction of the Courts Administration Division of the Ministry of the Attorney General. To the extent that use of municipal police forces is considered desirable, appropriate arrangements should be made with the municipal authorities involved and adequate funding should be provided for that purpose.

96. The police should be responsible for physical execution of civil arrest and committal warrants, at the direction of the sheriff, and appropriate financial arrangements should be made with the municipal police forces for the carrying out of these functions.

97. The sheriffs should continue to have primary responsibility for the enforcement of all other civil process, including orders and writs that require the delivering up of possession of goods or premises, but the police should have a clear duty to respond to the call of the sheriff for assistance whenever the sheriff has reason to believe that resistance may be offered.

98. Sheriffs should be provided with adequate personnel to provide prompt, efficient service to the public in those areas remaining within the responsibility of the sheriff.

CASEFLOW MANAGEMENT

99. The Ontario Courts Management Committee, after consultation with the bar and the public, should set targets for the time period within which the average case (in each line of business coming before the courts) should be completed. The standards should be well publicized. The standards should be applied, in a flexible fashion, in the utilization of caseflow management techniques. Those techniques should include status hearings for civil and family cases, pre-trial conferences, motions for directions and the assignment of a judge to dispose of all motions in complex or interrelated cases.

100. A sophisticated, computerized management information system should be installed in the courts of Ontario to provide ready access to at least the following information: number, nature and size of cases commenced; progress of cases through each major step; adjournment rates; number and type of dispositions; elections in criminal cases; sitting hours and days available at each location for each court; actual sitting hours and days at each location for each court; judges' sitting schedules and actual sitting times, broken down by type of case; average hearing times for each type of case in each court. The information should be readily accessible in each major court centre for all the centres of the province.

101. Court judgments should be enforceable throughout Ontario on the filing of the appropriate material in any permanent court centre, and the management information system in use in the courts should include a computerized system to make this possible.

102. All trial courts and all appeal courts should adopt a fixed date scheduling system, making use of professional trial co-ordinators who apply overbooking principles to ensure that judges and courtrooms are kept busy. To the extent that a case cannot be reached, it should be guaranteed a hearing date promptly after the initial one. Long hearings should not be split, but where this is unavoidable, they should not be split into more than two segments and every effort should be made to ensure that the judge who commences the case is immediately made available to complete it.

103. The Courts Management Committees should explore the use of closed circuit or satellite television and conference telephone links for first appearances in criminal and family court and for pre-trial conferences in all courts. The Attorney General should seek an amendment to the Criminal Code to make this possible.

104. The government, the judiciary and the Courts Management Committees should engage in a constant process of evaluation, innovation and experimentation to ensure that the court system provides the best possible service to the people of Ontario.

CHAPTER 8

APPEALS

105. Counsel, in appeal cases, should be required to estimate the time needed, and except with leave of the court, the estimated time should be the maximum time allowed. This estimate should be given not only to the registrar but should also be transmitted to the court hearing the appeal by inclusion in each factum.

106. Statutory recognition should be given to the power of the court to impose time limits on arguments in appeals.

107. Written appeals should be extended to and be mandatory in small civil appeals such as the civil appeals emanating from the Provincial Court. With leave, oral argument should be permitted in Provincial Court civil appeals.

ALTERNATE DISPUTE RESOLUTION

108. The judiciary should set up seminars and continuing legal education programs with respect to the value and operation of alternative methods of dispute resolution. The seminars should include instruction with respect to the skills necessary to conduct effective pre-trial conferences and mediation hearings.

109. Pre-trial conferences should be compulsory in the Superior Court and no case should be listed for trial until a pre-trial conference has been held.

110. After the close of pleadings, any party to a Superior Court action should be able to obtain a pre-trial hearing simply by asking for it.

111. Pre-trial conferences in the Superior Court should be conducted by judges wherever possible.

112. The Provincial Court (Civil Division) rules should be amended to provide that the pre-trial should be held before the clerk of the court or referee unless otherwise ordered by a judge; and in that instance, the pre-trial must be conducted by a judge.

113. Suitable instruction should be provided to the clerks and referees of the Civil Division with particular emphasis on consumer protection legislation.

114. In civil cases in the Provincial Court, a pre-trial should be a prerequisite before a case is listed for trial.

115. The rules for family law cases should be amended to provide that, prior to the commencement of an application, either spouse may request mediation and that, upon receipt of such a request, mediation service will be offered to the parties.

116. The Attorney General should seek an amendment to s. 553.1 of the Criminal Code to provide that a pre-trial hearing in non-jury cases may be held upon order of the presiding judge, which order may be made upon the application of either crown or defence.

117. The local Courts Management Committee should closely monitor the pre-hearing conference in criminal cases in order to ensure that the process is not abused.

118. A voluntary arbitration mechanism should be built into the justice system. After the commencement of a proceeding, either party should be able to propose that the matter be resolved by arbitration. If the other party or parties agree, and the parties agree upon an arbitrator, the matter should proceed forthwith to arbitration. The arbitration should be a procedure of record and the procedure should accord with the principles of natural justice but the strict rules respecting the admissibility of evidence need not be observed. The arbitration award, when rendered, should be filed with the court in which the matter was commenced and be deemed to be a judgment of that court and appealable as a judgment of that court. The fees of the arbitrator should be paid by the parties to the dispute.

COSTS

119. For the assistance of assessment officers, the rules of the various courts should be amended to spell out the principle that the paramount consideration in the assessment of costs is the value of the work done.

120. The Solicitors Act should be amended to spell out the principle that solictor and client assessments of costs should reflect the value of work done.

121. A mechanism should be developed whereby there is some communication between the trial judge and the legal aid authority regarding the length of the trial.

122. Provision should be made that in any trial lasting more than two days, the trial judge should be required to certify whether the duration of the trial was reasonable or unreasonable; and if unreasonable, what an appropriate length would have been. The assessment of legal aid fees should then proceed on the basis of this opinion.

THE JUDICIARY

123. The Courts of Justice Act should be amended to provide that, in civil and family cases in the Provincial Court, a judge should not be bound by the strictures of the adversary system in cases in which the parties are unrepresented by counsel and in which the interests of justice demand intervention.

124. Cases of unusual difficulty or technicality should be assigned to judges experienced in that kind of case.

125. Bankruptcy matters should be assigned to a small number of judges experienced in that field.

PROCEDURES IN CIVIL CASES

126. The Rules Committee should add to the Rules of Civil Procedure a rule similar to rule 37.16 dealing with both oral and documentary discovery where discovery of only one person is involved.

127. Each courthouse should be supplied with telephone equipment which facilitates motions by conference telephone.

128. In order to encourage and educate judges and the legal profession, the Rules Committee should designate a number of simple motions that can be dealt with by conference telephone at the request of either party.

129. Similar rules should be enacted to provide for motions by telephone conference in the Provincial Court in the exercise of its civil and family law jurisdiction.

PROCEDURES IN CRIMINAL CASES

130. The Chief Judge of the Provincial Court in consultation with the Ontario Courts Management Committee should issue a practice direction that a procedure along the following lines will be observed in criminal cases in the Provincial Court:

i) First appearance - At this time, if asked for, an adjournment would be given to permit an accused an opportunity to seek advice or legal aid and retain a lawyer. This adjournment period would also permit the lawyer time to seek disclosure from and discuss the case with a prosecutor.

ii) Second appearance - On this appearance, the accused would,

(a) plead guilty;
(b) plead not guilty and a trial date would be set in that court; or
(c) elect trial in some other court, at which time a date for preliminary hearing would be set.

iii) Third appearance - Depending on what had transpired at the second appearance, there would be a sentencing, a trial or a preliminary hearing.

131. To the extent possible, the preliminary appearances should take place before a justice of the peace, thus further conserving the time of the Provincial Court judge.

132. The Attorney General should seek an amendment to s. 738(1) of the Criminal Code eliminating the eight day limitation on adjournments.

133. Crown prosecutors should be involved to a far greater degree in the determination of what charge is to be laid.

134. The Attorney General should seek an amendment to the Canada Evidence Act by adding to that Act a provision similar to rule 53.03 respecting expert witnesses.

135. The Attorney General should seek an amendment to the Canada Evidence Act to add a section similar to s. 52 of the Ontario Evidence Act concerning medical reports.

136. The Attorney General should seek an amendment to s. 438 of the Criminal Code which would provide that rule making power be consigned to a Criminal Rules Committee. Such a rules committee should be composed of representatives of all the courts with criminal jurisdiction in Ontario together with representatives of the prosecution and defence bars and the administration of the courts.

137. The Attorney General should upgrade the present guidelines respecting crown disclosure to a directive to be observed unless the crown prosecutor can demonstrate to the Attorney General why, in a particular case, disclosure cannot be made.

CHAPTER 9

COURT ACCOMMODATION

138. All new courthouse design should be based on the model of a consolidated courthouse and, to the extent possible, current facilities should accommodate all courts and court offices.

139. Remote centres should be served by itinerant satellite court operations and there should be permanent Provincial Court satellite courts in smaller centres of Ontario.

140. Where there is permanent court accommodation, resort to ad hoc accommodation should be kept to an absolute minimum.

141. A complete set of courtroom and courthouse designs should be created to be used whenever new facilities are to be built or present facilities are to be renovated.

142. The courthouse should be designed so that judges and jurors have secure access to the courtrooms and the accused also has secure but separate access to the courtrooms from the holding areas.

143. The public spaces of a courthouse should be maintained and not be renovated into courtrooms and offices.

144. Courthouses should be well signposted and information pamphlets should be available for public use.

CHAPTER 10

JUDGES

145. Where necessary, the chief justice (or chief judge or associates) should be provided with an administrative assistant.

146. Appointments to the office of chief justice (or chief judge or associates) should be made for fixed terms of five years.

147. Both levels of goverment should approach the issue of judicial appointments on a businesslike basis and this issue should be addressed well before vacancies arise.

148. The Attorney General should seek financial support from the federal government to establish a national program for the training of new judges. If, however, such support is not forthcoming from the federal government, the Ontario government should establish its own education program for judges.

149. The members of the Ontario appellate courts and the Superior Court should be addressed as "your Honour".

CROWN ATTORNEYS

150. The Attorney General's department should scrutinize the number of crown attorneys available in the larger centres of Ontario with a view to increasing their number so that they have enough time to adequately discharge their functions other than those of appearing in court.

151. To the extent possible, the use of part time crown prosecutors should be discontinued.

ADMINISTRATIVE PERSONNEL

152. The practice of filling senior administrative positions by order in council should cease.

LEGAL RESEARCH

153. There should be organized at Osgoode Hall in Toronto, an office of legal research to be headed by a director.

154. In each region in Ontario, there should be at least one staff lawyer, the legal research officer for the region, and there should be assigned to this person one or more law clerks, graduates of either the LL.B. program or the Bar Admission course.

CHAPTER 11

ACCESS TO DOCUMENTS

155. The Ontario Courts Management Committee should provide all of the administrative offices with a clear statement respecting the public character of the documents within the court system, and they should list the exceptions to this rule.

ELECTRONIC MEDIA IN THE COURTROOM

156. Section 146 of the Courts of Justice Act should be amended to permit the electronic media into the courtroom for a period of two years. The media coverage should conform to the Radio and Television News Directors Association model guidelines.

157. Section 146 of the Courts of Justice Act should be amended to permit the use of tape recorders in the courtroom

as a method of taking notes.

COURT REPORTING

158. Whenever possible, court reporting services should be provided to the Superior Court locally rather than oblige a court reporter to travel with the judge within a region.

159. The courts of Ontario should utilize the CAT system and the open microphone system of court reporting. The determination of which system should be used in which courts should be made on businesslike principles.

Appendix 1

COURT LOCATIONS VISITED

Hamilton - Unified Family Court - District Court - Provincial Courts (Criminal and Family)	August 18, 1986
Toronto - Supreme and District Court - Provincial Court (Criminal Division)	August 19, 1986
Scarborough - Provincial Courts (Criminal and Family)	August 20, 1986
Toronto - Provincial Court (Family Division)	August 28, 1986
Brampton - District Court - Provincial Court (Criminal, Family and Civil)	September 8, 1986
Windsor - District Court - Provincial Courts (Criminal and Family)	September 15-16, 1986
Detroit - Wayne County Circuit Court	September 17, 1986
Vancouver - Supreme and County Courts - Provincial Court (Criminal Division)	September 22-23, 1986
Montreal - Court of Appeal - Provincial Court	October 20-22, 1986

COURT LOCATIONS VISITED

- Superior Court - Court of Sessions of the Peace - Youth Court	
Ottawa - District Court - Provincial Courts (Criminal and Family) - Ottawa-Carleton Law Association (at Mont Ste. Marie Conference)	November 27-29, 1986
Thunder Bay - District Court - Provincial Courts (Criminal and Family) - Thunder Bay Law Association	December 1 & 2, 1986
Sault Ste. Marie - District Court - Provincial Courts (Criminal, Family and Civil)	December 3, 1986
Bruce Mines - Provincial Court (Criminal)	December 3, 1986
Sudbury - District Court - Provincial Courts (Criminal, Family and Civil)	December 4, 1986
Windsor - District Court - Provincial Court (Criminal)	January 26-27, 1987
Detroit - Court annexed arbitration program	January 28, 1987
London - District Court - Middlesex County Law Association	January 29, 1987

Appendix 2

COSTS IN DISTRICT COURT

Introduction

To understand this appendix, one must first understand a little about what "costs" are, who pays them, and how they are calculated.

What Costs Are

In a court case, each party is responsible for paying the applicable court fees (for filing documents, serving documents, etc.), the fees charged by the party's own lawyer for the case, and disbursements paid by the lawyer. Disbursements are usually amounts charged by a person outside the court system for a particular service provided, such as fees paid to an expert for a report, the cost of a transcript of evidence, etc. These amounts are all called "costs".

Court fees are all prescribed by a government regulation. Lawyers' fees are a matter of negotiation between the lawyer and his or her client. Disbursements are generally whatever the lawyer has had to pay to obtain a particular service necessary for the conduct of the case.

Who Pays Costs

Initially each party is responsible for his or her own costs (court fees, lawyer fees and disbursements). These are called "solicitor and client costs" because the bill for them is presented by the lawyer to his or her own client. However, at the end of a court case, it is usual for the court to order the losing party to pay a substantial portion of the winning party's costs. This award of costs to the winner is called "party and party costs" because they are costs paid by one party to another party.

How Party and Party Costs are Calculated

Party and party costs are calculated according to a tariff of costs prescribed by a government regulation. The tariff allows for certain maximum amounts to be charged for lawyers' fees. Usually a lawyer charges his or her own client more than the maximum amount in the tariff. Thus, a party's solicitor and client costs (the amount the party must pay to his or her own lawyer) are usually more than can be recovered from the other side by an award of party and party costs. As a very rough rule of thumb, party and party costs usually are about half to two-thirds of the solicitor and client costs. Sometimes they are less than half, and occasionally they are more than two-thirds.

When a party has been awarded the party and party costs of a case, his or her lawyer submits a bill of costs to the other side for payment. If the proper amount of party and party costs cannot be agreed on by the two lawyers, the bill can be submitted for assessment by a court official known as an assessment officer.

The Figures in this Appendix

Statistics are not kept concerning the amount of party and party costs in the courts. Accordingly, this Inquiry had to undertake its own research by way of sampling from court records. The figures below show all of the party and party bills of costs that came before an assessment officer in October, 1986 in Toronto, London, Whitby, Sudbury, Kingston and Kitchener. Those locations were chosen as being representative of all 48 locations of the District Court. They handle 47.7% of the District Court's annual volume of civil and family actions disposed of and 59% of civil and family applications commenced. However, as these bills of costs were all sufficiently contested that they went through the process of assessment, they may or may not be a representative sample of all District Court cases including those where the parties agreed on the amount properly allowable for costs.

ITEM	TORONTO.	OUTSIDE TORONTO	COMBINED FIGURE
Number of bills of costs assessed	43	26	69
- breach of contract	17	8	25
- motor vehicle	9	7	16
- other personal injury or property damage	4	0	4
- mental incompetency	3	0	3
- family law	0	2	2
- landlord and tenant	2	0	2
- mortgage	1	1	2
- construction lien	0	1	1
- other	7	7	14
Average total bill*	$3,660	$4,447	$3,957

ITEM	TORONTO	OUTSIDE TORONTO	COMBINED FIGURE
Adjusted average total bill**	$3,223	$3,567	$3,351
Pleadings - average cost	$ 90	$ 92	$ 91
Motions - average cost	$440	$286	$391
Discovery of documents - average cost	$ 67	$ 68	$ 68
Examinations - average cost	$448	$419	$435
Pre-trial conference - average cost	$114	$130	$121
Preparation and counsel fee - average cost	$2,244	$2,539***	$2,373

* Includes one bill in Toronto of $22,011 for a two day trial and one bill outside Toronto of $26,444 for a 14 day trial.

** Excludes the two bills referred to in * above, which are unusually high.

*** Not including 14 day trial outside Toronto.

Appendix 3

CIVIL AND FAMILY JUDGMENTS IN DISTRICT COURT

Statistics are not kept concerning the kinds of cases in the District Court or the amounts of the judgments awarded. Accordingly, this Inquiry had to undertake its own research by way of sampling from court records. The figures below show all civil and family judgments (including all final landlord and tenant orders, but not including dismissals of an action or application), entered in the court records in October, 1986 in Toronto, London, Whitby, Sudbury, Kingston and Kitchener. The figures include those judgments granted by judges and registrars, whether on default, on motion, on application, after trial or on consent. They do not include judgments in Supreme Court proceedings even though given by the District Court judges or registrars. The six locations were chosen as being representative of all 48 locations of the District Court. They handle 47.7% of the District Court's annual volume of civil and family cases disposed of.

ITEM	NUMBER OF JUDGMENTS			PERCENTAGE OF GENERAL CIVIL JUDGMENTS			PERCENTAGE OF TOTAL JUDGMENTS		
	Toronto	Outside Toronto	Total	Toronto	Outside Toronto	Combined Figure	Toronto	Outside Toronto	Combined Figure
All judgments	1,394	421	1,815	N.A.	N.A.	N.A.	100	100	100
Family judgments	6	64	70	N.A.	N.A.	N.A.	0.4	15.2	3.9
Landlord and tenant judgments and final orders	625	118	743	N.A.	N.A.	N.A.	44.8	28	40.9
General civil judgments	763	239	1,002	100	100	100	54.7	56.8	55.2

Appendix 4

ITEM	NUMBER OF JUDGMENTS			PERCENTAGE OF GENERAL CIVIL JUDGMENTS			PERCENTAGE OF TOTAL JUDGMENTS		
(General civil judgments - breakdowns)	Toronto	Outside Toronto	Total	Toronto	Outside Toronto	Combined Figure	Toronto	Outside Toronto	Combined Figure
- $1001-$3000	180	99	279	23.6	41.4	27.8	12.9	23.5	15.4
- $3001-$5000	167	51	218	21.9	21.3	21.8	12.0	12.1	12.0
- $5001-$7500	144	31	175	18.9	13.0	17.5	10.3	7.4	9.6
- $7501-$10000	68	17	85	8.9	7.1	8.5	4.9	4.0	4.7
Subtotal $1001-$10000	559	198	757	73.3	82.8	75.6	40.1	47.0	41.7
- $10001-$15000	77	11	88	10.1	4.6	8.8	5.5	2.6	4.9
- $15001-$25000	73	11	84	9.6	4.6	8.4	5.2	2.6	4.6
- $25001-$35000	20	5	25	2.6	2.1	2.5	1.4	1.2	1.4
- $35001-$50000	14	1	15	1.8	0.4	1.5	1.0	0.3	0.8
- $50001-$100000	14	3	17	1.8	1.3	1.7	1.0	0.7	0.9
- over $100000	2	2	4	0.3	0.8	0.4	0.1	0.5	0.2
- other relief	4	17	21	0.5	7.1	2.1	0.3	4.0	1.2

Appendix 4

ANALYSIS OF CASELOAD DISTRIBUTION

COUNTY OR DISTRICT	POPULATION (000's) (Rounded)	SUPREME COURT CASELOAD 1985-86				DISTRICT COURT CASELOAD 1985-86					
		CRIMINAL	CIVIL			CRIMINAL	CIVIL				
			ACTIONS	APPL'NS	MOTIONS		ACTIONS	APPL'NS	MOTIONS	LAT	SURR.
1. NORTH											
Kenora	36	2	11	12	4	120	157	26	67	13	179
Rainy River	20	0	2	14	86	39	75	62	111	9	86
Thunder Bay	144	12	44	101	182	382	373	360	116	113	490
Algoma	124	11	65	178	14	432	547	470	1,772	73	283
Cochrane	87	4	43	54	2	199	286	164	147	9	243
Manitoulin	7	0	2	4	15	9	16	11	5	0	56
Sudbury	173	3	68	70	108	275	452	395	150	107	557
Timiskaming	37	2	22	15	8	39	102	57	84	12	144
Nipissing	74	3	28	46	4	109	250	20[illegible]	1,018	50	172
Parry Sound	29	1	30	7	18	26	91	110	21	8	147
TOTAL	731	38	315	501	441	1,630	2,349	1,878	3,491	394	2,357
% OF PROVINCE	8.2%	15.3%	7.6%	11.1%	5.6%	9.8%	7.7%	6.4%	9.9%	1.6%	8%
2. EAST											
Prescott/Russell	57	2	16	20	7	122	86	44	395	13	178
Stormont/Dundas/ Glengarry	102	0	21	28	0	39	248	54	517	69	383
Ottawa-Carleton	600	14	219	682	1 ,040	737	1,920	2,483	1,594	1,793	1,655
Leeds/Grenville	83	2	13	57	2	51	234	155	476	44	364
Lanark	48	1	6	13	1	40	108	48	152	9	231
Renfrew	87	2	16	84	18	71	257	147	271	25	386
Frontenac	118	3	36	74	47	113	437	332	1,299	178	390
Lennox/Addington	33	11	4	6	0	24	66	29	166	19	89
Hastings	108	3	25	89	4	146	478	284	1,393	137	374
Prince Edward	22	0	0	0	0	22	54	36	55	12	122
TOTAL	1,258	38	356	1,053	1,119	1,365	3,888	3,612	6,318	2,299	4,172
% OF PROVINCE	14.2%	15.3%	7.4%	23.3%	14.3%	8.2%	12.7%	12.4%	17.9%	9.4%	14.1%
3. CENTRAL EAST											
Northumberland	67	1	10	24	0	41	164	70	223	56	288
Peterborough	103	0	29	37	82	65	399	222	140	103	379
Haliburton	12										
Victoria	52	4	12	17	0	65	124	85	41	20	208
Durham	314	3	114	147	152	617	1,050	320	224	539	813
Muskoka	38	0	11	21	56	38	117	37	63	15	229
Simcoe	232	20	95	107	1,279	358	807	202	1,015	203	896
York Region	324	8	79	63	0	409	607	276	1,378	195	721
TOTAL	1,142	36	350	416	1,569	1,593	3,268	1,212	3,084	1,131	3,534
% OF PROVINCE	12.9%	14.4%	7.3%	9.2%	20%	9.5%	10.7%	4.1%	8.7%	4.6%	12%
4. TORONTO											
Metro Toronto	2,155	42	2,301	893	1,010	7,223	10,134	15,579	6,472	13,393	7,336
% OF PROVINCE	24.3%	16.9%	47.9%	19.7%	12.9%	43.3%	33%	53.3%	18.3%	55%	24.9%
5. CENTRAL WEST											
Peel	566	10	116	126	1,323	1,110	1,750	673	2,187	2,099	856
Halton	264	2	62	209	938	245	829	489	865	258	696
Dufferin	32	0	15	7	4	19	86	51	5	18	144
Grey	74	0	13	20	40	72	173	103	36	14	435
Wellington	140	4	38	58	0	208	369	115	613	127	534
Bruce	58	0	14	18	28	24	99	64	80	11	344
TOTAL	1,134	16	258	438	2,333	1,678	3,315	1,495	3,786	2,527	3,009
% OF PROVINCE	12.8%	6.4%	5.4%	9.7%	29.7%	10.1%	10.8%	5.1%	10.7%	10.4%	10.2%
6. CENTRAL SOUTH											
Niagara	369	6	160	240	3	307	1,255	485	617	351	1,349
Haldimand-Norfolk	88	8	21	56	98	87	288	122	232	54	396
Hamilton-Wentworth	421	21	225	56	0	676	556	1,779	2,629	1,535	1,387
Brant	101	0	19	52	328	119	376	199	484	187	475
Waterloo	328	6	221	170	37	217	1,235	318	2,928	613	926
TOTAL	1,307	41	646	574	466	1,406	3,710	2,903	6,890	2,740	4,533
% OF PROVINCE	14.7%	16.5%	13.4%	12.7%	5.9%	8.4%	12.1%	10%	19.5%	11.3%	15.4%
7. SOUTHWEST											
Essex	316	11	218	268	305	474	1,103	1,379	819	614	1,153
Kent	105	2	35	56	333	85	321	180	177	85	457
Lambton	122	1	72	39	3	94	537	353	831	121	482
Elgin	69	0	22	29	0	125	199	138	304	47	346
Middlesex	338	22	214	213	246	904	1,325	300	2,909	895	1,185
Huron	56	0	2	17	15	14	115	43	63	16	262
Oxford	85	0	11	8	0	66	263	94	226	66	355
Perth	66	2	8	18	7	28	150	57	15	14	320
TOTAL	1,157	38	582	648	909	1,790	4,013	2,544	5,344	1,858	4,560
% OF PROVINCE	13%	15.3%	12.1%	14.3%	11.6%	10.7%	13.1%	8.7%	15.1%	7.6%	15.5%
PROVINCIAL TOTAL	8,884	249	4,808	4,523	7,847	16,685	30,677	29,223	35,185	24,342	29,501

COUNTY OR DISTRICT	PROVINCIAL COURT CASELOAD 1985-86				SUPREME COURT JUDGES SITTING HOURS 1985-86 (ROUNDED)					
					CIVIL				CRIMINAL	
	CRIM. DIV. & P.O.C.	YOUTH COURT CRIM.& FAM.	FAMILY DIV.	CIVIL DIV.	NON-JURY	JURY	DIV.	MOTIONS	NON-JURY	JURY
1. NORTH										
Kenora	26,354	C 617 F 877	739	705	16	119	0	0	2	6
Rainy River	6,225	C 113 F 142	140	346	0	0	0	0	0	0
Thunder Bay	43,919	C 773 F 892	1,194	2,609	115	24	9	0	8	433
Algoma	34,248	C 721 F 870	568	1,895	233	83	21	0	23	112
Cochrane	30,988	C 507 F 691	939	1,460	83	19	0	0	3	106
Manitoulin	2,859	C 64 F 96	170	111	4	0	0	32	11	40
Sudbury	38,649	C 666 F 575	1,482	2,334	138	46	13	0	81	82
Timiskaming	12,467	C 168 F 134	410	835	4	3	0	0	2	24
Nipissing	17,491	C 481 F 472	506	1,592	17	8	0	0	11	80
Parry Sound	10,182	C 160 F 146	166	414	29	27	0	0	12	10
TOTAL % OF PROVINCE	223,382 7.4%	9.165 16%	6,314 10.8%	12,301 10.1%	639 6.7%	329 14.6%	41 4.9%	32 0.8%	151 9.9%	893 14.4%
2. EAST										
Prescott/Russell	9,162	C 51 F 126	244	502	30	0	0	0	0	1
Stormont/Dundas/ Glengarry	31,033	C 285 F 270	601	1,181	53	0	0	0	2	0
Ottawa-Carleton	222,386	C 1,576 F 1,359	3,741	6,244	951	91	31	0	376	440
Leeds/Grenville	22,798	C 280 F 166	662	1,023	54	39	2	0	13	53
Lanark	10,943	C 122 F 93	280	613	2	36	0	3	6	41
Renfrew	17,160	C 189 F 136	789	808	35	0	9	0	[illegible]	8
Frontenac	46,601	C 247 F 574	1,712	1,627	135	39	0	0	9	2
Lennox/Addington	9,833	C 116 F 94	332	762	7	0	0	0	5	18
Hastings	32,049	C 310 F 374	1,226	1,469	36	3	0	0	0	39
Prince Edward	3,913	C 58 F 43	180	195	4	0	0	0	0	0
TOTAL % OF PROVINCE	405,870 13.4%	6,469 11.3%	9,767 16.7%	14,404 11.8%	1,307 13.7%	208 9.2%	42 4.7%	3 0.1%	443 2.9%	602 9.7%
3. CENTRAL EAST										
Northumberland	28,351	C 331 F 131	437	1,553	35	0	0	0	6	0
Peterborough	28,697	C 361 F 459	1,148	1,383	27	31	0	0	1	0
Haliburton Victoria	14,095	C 137	488 589	138	48	1	0	0	9	175
Durham	85,649	C 1,100 F 876	1,784	3,978	103	39	6	0	3	13
Muskoka	18,352	C 110 F 175	202	639	35	4	0	0	20	4
Simcoe	77,407	C 1,074 F 1,079	1,368	3,080	104	24	2	0	24	209
York Region	80,291	C 699 F 706	870	4,024	121	38	0	0	357	192
TOTAL % OF PROVINCE	332,842 11%	7,511 13.1%	6,297 10.8%	15,384 12.6%	473 5%	137 6.1%	8 0.9%	0 0%	420 2.8%	593 9.6%

COUNTY OR DISTRICT	PROVINCIAL COURT CASELOAD 1985-86				SUPREME COURT JUDGES SITTING HOURS 1985-86 (ROUNDED)					
					CIVIL				CRIMINAL	
	CRIM. DIV. & P.O.C.	YOUTH COURT CRIM.& FAM.	FAMILY DIV.	CIVIL DIV.	NON-JURY	JURY	DIV.	MOTIONS	NON-JURY	JURY
4. TORONTO										
Metro Toronto	1,017,197	7,764 6,900 14,464	12,732	35,784	4,560	895	692	3,561	204	1,684
% OF PROVINCE	33.7%	25.4%	21.8%	29.4%	47.9%	39.8%	78.1%	92.9%	13.4%	27.2%
5. CENTRAL WEST										
Peel	181,794	C 1,097 F 1,222	2,326	6,124	162	68	29	0	133	268
Halton	72,045	C 516 F 646	1,149	2,675	148	30	0	0	0	162
Dufferin	6,415	C 108 F 141	173	493	12	10	17	0	5	5
Grey	15,706	C 150 F 171	476	828	66	17	0	0	0	0
Wellington	36,504	C 345 F 283	874	2,282	119	2	0	0	2	26
Bruce	18,516	C 175 F 183	369	536	49	5	0	0	0	0
TOTAL % OF PROVINCE	330,980 11%	5,037 8.8%	5,367 9.2%	12,938 10.6%	556 5.8%	132 5.9%	46 5.2%	0 0%	140 9.2%	661 7.4%
6. CENTRAL SOUTH										
Niagara	86,557	C 955 F 898	2,757	4,737	128	77	39	0	7	434
Haldimand-Norfolk	23,472	C 231 F 248	657	931	14	5	0	0	10	184
Hamilton-Wentworth	172,546	C 1,429 F 1,355	2,331	4,865	258	100	0	0	77	484
Brant	22,919	C 378 F 377	842	1,419	68	24	0	0	4	103
Waterloo	80,709	C 905 F 835	1,785	4,298	368	4	0	0	33	208
TOTAL % OF PROVINCE	386,203 12.8%	7,611 13.3%	8,372 14.4%	16,250 13.3%	836 8.8%	210 9.3%	39 4.4%	0 0%	131 8.6%	1,413 22.8%
7. SOUTHWEST										
Essex	100,444	C 735 F 650	1,837	3,868	405	160	7	36	1	259
Kent	32,981	C 387 F 461	2,282	2,024	67	28	8	0	0	52
Lambton	31,854	C 523 F 525	1,347	1,344	155	9	0	0	2	0
Elgin	22,621	C 201 F 272	796	1,042	46	22	0	0	0	0
Middlesex	87,871	C 915 F 1,076	1,867	4,385	432	119	1	203	24	236
Huron	8,834	C 71 F 121	307	614	0	0	0	0	0	0
Oxford	20,389	C 239 F 329	511	1,057	44	1	0	0	0	0
Perth	19,095	C 166 F 140	545	391	0	0	0	0	0	7
TOTAL % OF PROVINCE	324,089 10.7%	6,811 11.9%	9,492 16.3%	14,725 12.1%	1,149 12.1%	339 15.1%	16 18%	239 6.2%	37 2.4%	554 8.9%
PROVINCIAL TOTAL	3,020,571	57,268	58,341	121,786	9,520	2,250	886	3,835	1,526	6,200

COUNTY OR DISTRICT	DISTRICT COURT JUDGES SITTING HOURS 1985-86 (ROUNDED)										PROVINCIAL COURT JUDGES SITTING HOURS 1985-86(ROUNDED)				
	CIVIL						CRIMINAL								
	NON-JURY	JURY	DIV.	MISC.	SM.CL.	MOTIONS	NON-JURY	JURY	APP.	BAIL	CRIM.	FAM.	P.O.C.	YOUTH	CIV.
1. NORTH															
Kenora	47	0	49	1	38	33	50	34	1	2	782	383	255	175	69
Rainy River	16	0	11	10	32	30	68	18	0	6	447	108	100	116	51
Thunder Bay	313	34	88	15	1	247	594	91	36	12	1,304	495	443	365	240
Algoma	570	0	178	70	1	492	958	346	41	80	1,572	271	434	434	225
Cochrane	54	1	45	8	0	174	216	91	22	9	990	290	205	239	129
Manitoulin	5	1	8	18	11	20	36	4	3	0	172	34	17	20	45
Sudbury	186	11	92	18	1	329	502	183	37	19	1,314	464	464	361	219
Timiskaming	78	6	28	2	3	69	119	30	2	4	291	97	87	41	72
Nipissing	60	11	19	57	0	127	132	108	12	3	776	202	326	248	165
Parry Sound	62	5	44	10	3	27	26	46	5	4	308	72	151	78	51
TOTAL	1,391	69	562	209	90	1,548	2,701	951	159	139	7,956	2,416	2,482	2,077	1,266
% OF PROVINCE	12.2%	3.4%	14%	5.2%	4.4%	11.2%	14.2%	6.5%	9.2%	19.8%	12.6%	12.1%	11.1%	17.7%	8.6%
2. EAST															
Prescott/Russell	54	0	18	17	0	71	99	155	10	11	579	88	245	69	48
Stormont/Dundas/ Glengarry	115	0	35	3	0	59	55	57	0	1	796	423	305	169	99
Ottawa-Carleton	786	29	159	231	0	1,242	1,045	660	25	108	4,652	872	799	945	720
Leeds/Grenville	59	3	43	0	76	0	134	146	6	9	690	216	318	95	87
Lanark	33	3	14	9	21	0	83	29	2	27	316	122	167	45	54
Renfrew	88	8	33	10	52	102	124	67	21	8	822	429	393	143	108
Frontenac	127	9	58	17	135	158	99	127	22	8	1,243	599	345	138	156
Lennox/Addington	23	0	6	15	36	0	26	46	3	0	307	82	104	49	51
Hastings	78	8	69	8	95	2	181	118	15	21	1,330	443	373	187	144
Prince Edward	36	0	3	4	32	15	18	0	3	0	138	60	60	42	36
TOTAL	1,397	60	438	314	447	1,649	1,864	1,405	106	193	10,873	3,334	3,129	1,882	1,503
OF PROVINCE	12.2%	2.9%	10.9%	15.4%	17%	11.9%	9.8%	9.6%	6.1%	27.5%	17.2%	16.8%	14.1%	16.1%	10.2%
3. CENTRAL EAST															
Northumberland	12	0	26	0	6	9	49	114	0	5	952	162	539	144	168
Peterborough	69	16	32	12	1	93	47	143	13	0	1,150	376	397	167	150
Haliburton											90	0	42	3	33
Victoria	85	0	30	13	122	153	113	200	12	2	90	678	123	154	62
Durham	429	26	230	23	0	506	984	580	58	34	3,026	864	973	594	133
Muskoka	2	3	6	1	52	45	91	22	1	2	399	151	248	89	84
Simcoe	327	29	222	51	144	459	560	784	88	44	3,073	823	933	659	309
York Region	263	2	99	115	0	273	718	618	51	22	2,823	639	1,492	373	519
TOTAL	1,187	76	645	215	340	1,538	2,562	2,461	223	109	12,191	3,138	4,778	2,091	1,458
% OF PROVINCE	10.4%	3.6%	16.1%	10.6%	20.5%	11.1%	13.4%	16.8%	12.8%	15.5%	19.3%	15.8%	21.3%	17.8%	10%
4. TORONTO															
Metro Toronto	2,990	1,192	0	414	0	3,464	4,441	4,285	628	523	29,468	5,994	10,489	4,495	6,146
% OF PROVINCE	26.2%	57.1%	-	28.4%	-	25.1%	23.2%	29.2%	36.2%	74.6%	46.6%	30.1%	47.1%	38.3%	41.8%
5. CENTRAL WEST															
Peel	352	131	501	338	0	633	2,545	1,716	145	37	6,037	1,249	2,186	1,041	260
Halton	383	71	307	40	0	646	441	282	35	16	1,808	312	780	218	450
Dufferin	204	2	11	0	35	87	20	19	4	0	395	72	132	59	54
Grey	87	1	11	0	0	0	128	65	3	0	505	333	283	111	81
Wellington	145	3	24	49	0	141	192	116	19	18	764	390	341	130	237
Bruce	136	0	22	32	39	5	11	2	13	1	479	138	373	75	78
TOTAL	1,307	208	876	459	74	1,512	3,337	2,200	219	72	9,988	2,494	4,095	1,634	1,160
% OF PROVINCE	11.4%	10%	21.9%	22.6%	28.1%	10.9%	17.4%	15%	12.7%	10.3%	15.8%	12.5%	18.4%	13.9%	7.9%
6. CENTRAL SOUTH															
Niagara	429	65	281	30	8	622	575	538	54	28	3,594	1,124	1,249	559	486
Haldimand-Norfolk	117	3	57	24	118	191	84	146	6	0	586	228	172	121	150
Hamilton-Wentworth	349	192	0	55	0	518	894	361	33	6	3,958	2,727	1,231	80	477
Brant	141	54	29	2	0	227	162	198	4	0	840	348	238	174	150
Waterloo	498	48	214	50	0	627	486	290	43	26	3,039	658	912	456	522
TOTAL	1,534	362	581	161	126	2,185	2,201	1,533	140	60	12,017	5,085	3,802	2,190	1,785
% OF PROVINCE	13.4%	17.4%	14.6%	7.9%	4.8%	15.9%	11.5%	10.4%	8.1%	8.6%	19%	25.5%	17.1%	18.7%	12.1%
7. SOUTHWEST															
Essex	439	27	379	85	3	682	483	918	83	66	2,416	672	879	403	291
Kent	167	2	107	59	0	230	85	118	80	9	567	326	326	198	90
Lambton	180	31	138	28	12	294	194	97	27	15	1,205	794	811	329	201
Elgin	44	10	23	7	135	98	122	60	7	0	642	315	170	197	108
Middlesex	575	34	143	68	1,016	534	709	539	77	30	4,196	852	918	590	390
Huron	45	0	32	0	2	60	3	0	4	0	330	68	168	62	54
Oxford	130	15	57	14	122	28	140	38	19	7	540	153	194	132	180
Perth	43	0	27	1	63	0	102	68	5	1	769	278	491	115	84
TOTAL	1,623	119	903	262	1,353	1,926	2,038	1,838	262	128	10,175	3,458	3,557	2,026	1,398
% OF PROVINCE	14.2%	5.7%	22.5%	12.9%	51.4%	13.9%	10.6%	12.5%	15.1%	18.3%	17%	17.5%	16%	17.3%	9.5%
PROVINCIAL TOTAL	11,429	2,086	4,005	2,034	2,630	13,822	19,144	14,673	1,737	701	63,294	19,926	22,270	11,721	14,716

NOTES FOR ANALYSIS OF CASELOAD DISTRIBUTION

GENERAL COMMENT. Statistical reporting for the courts is at present plagued with inconsistencies, inaccuracies and lacking information. It is difficult to compare statistics from court to court, or even from county to county for the same court, for these reasons and because cases may be reported on a different basis for the different courts. The figures used in the analysis of caseload distribution represent the best available figures, made as consistent as possible, for as recent a period as possible. They should be used as a general guideline only and not as a precise measurement.

SOURCE. Population figures are from the 1986 Municipal Directory, published by the Ministry of Municipal Affairs. All other figures are obtained from the Ministry of the Attorney General, principally from statistics assembled by the Computer and Telecommunications Services Branch of that ministry for the fiscal year April 1, 1985 to March 31, 1986 (the most recent annual statistics available at time of writing).

CASELOAD. Caseload figures are for cases disposed of, except in Provincial Court (Civil Division), where figures are for claims issued in calendar year 1986. Cases disposed of include those disposed of by registrars and clerks.

SUPREME COURT CASELOAD. These figures are for High Court judges only and do not include local judges or masters.

APPLICATIONS AND MOTIONS. Figures are for applications and motions commenced, not disposed of. Supreme Court application and motion figures usually include some or all applications and motions intended to be heard by local judges: compare with sitting hours figures. Supreme Court sitting hours figures for motions include applications. Figures do not include motions heard by masters at Toronto, London, Ottawa and Windsor.

UNIFIED FAMILY COURT. This court, which exists only in Hamilton-Wentworth, hears all divorces and other family law cases in that judicial district. Sitting hours are included in Provincial Court sitting hours.

SITTING HOURS. Hours shown are net hours actually spent hearing cases in court, rounded to the nearest whole hour.

SUPREME AND DISTRICT COURT SITTING HOURS FOR MOTIONS. Several counties show no sitting time on motions. Presumably the hours are included in other sitting hours.

TORONTO DISTRICT COURT SITTING HOURS. Sitting hours for divorces heard by local judges are not reported, but are presumably included in the Toronto High Court divorce total.

PROVINCIAL COURT SITTING HOURS. Figures for Provincial Offences Court probably include justices of the peace in many cases. Civil Division hours are estimates only (except for Toronto), for calendar year 1985. Estimates are based on three sitting hours per sitting day. No more accurate figures are available. Civil Division sitting hours include deputy judges, and may to some extent be duplicated in District Court judges sitting hours for small claims.

Appendix 5

GUIDELINES TO CROWN ATTORNEYS AND OTHER CROWN COUNSEL IN THE MINISTRY OF THE ATTORNEY GENERAL WITH RESPECT TO DISCLOSURE BY THE CROWN IN CRIMINAL CASES

Introduction

1. It is recognized that generally there is a duty on the Crown:

(a) to disclose the Crown's case;

and (b) make defence aware of the existence of any other evidence relevant to the main issues which may be helpful to the defence and which is worthy of consideration by the Court but which the Crown may not intend to call as part of its case.

2. These guidelines are intended to provide a method of making such disclosure.

3. It is recognized that the precise mechanics or procedures adopted in carrying out these guidelines will vary from jurisdiction to jurisdiction throughout the Province and will be determined by the local Crown Attorney in accordance with local Crown and Police resources and with the needs of the local Defence Bar.

4. Generally, disclosure with respect to summary conviction and hybrid offences need not be as formalized as with other indictable offences.

First Appearance Disclosure

5.(a) Where resources and personnel permit the accused should be provided at the time of his first appearance with a document similar in nature to Appendix "A" to these guidelines [not attached].

(b) Where resources and/or personnel are insufficient to provide such a document, the Crown should take every reasonable step necessary to ensure that any accused or his counsel or counsel's agent who seeks such information at or near the time of the first appearance is given such information orally.

Disclosure Sufficient to Enable Counsel to Set a Date to Proceed

6. As soon as possible after the first appearance and in any event before the date set for the purpose of setting a date (which in some jurisdictions is referred to as an assignment court date), the Crown, at the request in writing of counsel for accused or counsel's agent, should provide the following:

(a) a copy of any written statement by the accused to a person in authority and disclosure of any oral statement made by the accused to a person in authority of which the Crown is aware and which the Crown, at the time of disclosure, intends to tender as part of the Crown's case-in-chief at trial or an undertaking to provide same when available;

(b) a copy of relevant laboratory and/or scientific reports if available or an undertaking to produce same when available;

(c) disclosure of the accused's criminal record and, where in the Crown counsel's view relevant, the criminal record of any witness;

(d) a copy of any medical report which relates to the accused or the victim and which is directly relevant to the charge(s) or an undertaking to produce same when available;

(e) photos, films and other documents intended to be entered: where preparation and resources permit and the nature of the exhibits suggest it is reasonable for the Crown to provide copies they should be provided; in other cases, an opportunity to inspect will be sufficient; even in those cases where it is appropriate to provide copies, it is recognized that it will often not be possible to provide such copies at this early date in which event an undertaking to produce prior to the preliminary hearing or trial will be sufficient;

(f) an outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case-in-chief at trial; an oral outline or synopsis, with a reasonable opportunity to take notes shall be sufficient for the purpose of providing counsel with sufficient information to set a date to proceed with a trial or preliminary hearing as the case may be: if a written outline or synopsis is available at this early stage, it may be provided in lieu of an oral outline or synopsis:

(g) any further information Crown counsel considers appropriate including, where circumstances warrant, the names and addresses of witnesses whom the Crown at the time of disclosure proposes to call as part of the Crown's case-in-chief at trial; in any case where names and addresses of witnesses are provided, the police should be asked to contact the witness to advise the witness of the fact that he or she may be contacted by the Defence and that it is up to the witness to decide, if he or she wishes to be interviewed.

Further Disclosure Prior to the Date Set to Proceed with a Preliminary Hearing or Trial

7.(a) Fulfil any undertakings made pursuant to paragraphs 6(a), (b), (d) and (e) above.

(b) In summary conviction and hybrid matters the oral outline or synopsis of the evidence of witnesses provided in the manner described in paragraph 6(f) above together with the disclosure provided pursuant to paragraph 5 shall, as a general rule, be sufficient if Defence counsel has been sufficiently informed in that manner prior to the setting of the date to proceed.

(c) In indictable (non-hybrid) matters, Crown counsel should, at the request in writing of counsel for the accused or counsel's agent, provide a written outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case at trial, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate. Such a written outline or synopsis may take the form of a document prepared for the purpose of disclosure, copies of "Will Says", or where considered appropriate by Crown counsel, copies of statements of the witnesses which have been reduced to writing.

8. Crown counsel, in his discretion, shall determine how disclosure prior to the preliminary hearing or trial can be made to an unrepresented accused.

9. It is expected that although Defence counsel will use his own discretion as to what portion of the content of written disclosure he will communicate to his client, it is expected that he will refrain from providing such written disclosure or copies thereof to his client.

10. It is expected that when the written disclosure is in the form of a "Will Say" or synopsis:

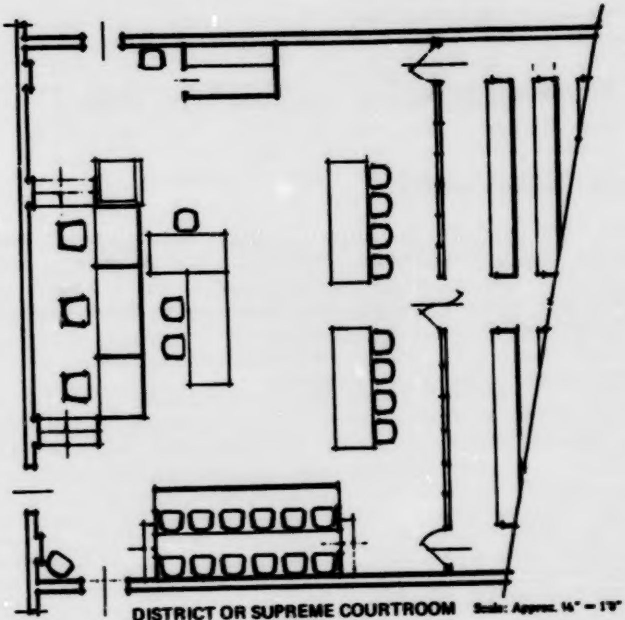
(a) Defence counsel will refrain from any attempt to treat such written disclosure as a statement made in writing or reduced to writing for purposes of s. 10 of the Canada Evidence Act, or, for the purpose of similar cross-examination at a preliminary inquiry;

and (b) if counsel chooses to cross-examine on the content of the document, he will refrain from doing so without first applying to the Court to have the jury excluded for the purpose of determining whether the "Will Say" statement is a notation of a prior oral statement relative to the subject matter of the case and inconsistent with the witness' present testimony so as to permit cross-examination pursuant to s. 11 of the Canada Evidence Act.

11. In indictable (non-hybrid) matters it is expected that after receiving the disclosure referred to above Defence counsel will advise the Court and the Crown, prior to the date set to proceed, the forum in which his client elects to be tried.

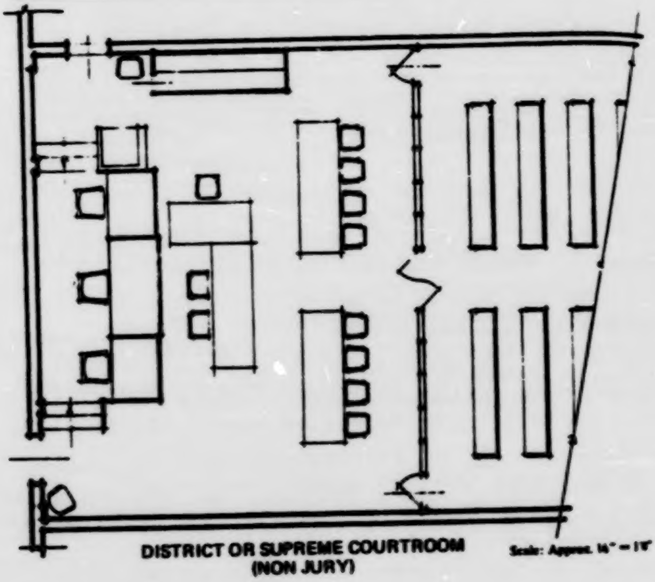
Appendix 6

STANDARD COURTROOM PLANS



DISTRICT OR SUPREME COURTROOM
(JURY)

Scale: Approx. ¼" = 1'0"



DISTRICT OR SUPREME COURTROOM
(NON JURY)

Scale: Approx. ¼" = 1'0"

Appendix 7

* CBA RECOMMENDATIONS FOR JUDICIAL APPOINTMENTS

Federal Judicial Appointments

1. The final decisions on appointments of judges must remain with the government. However, appointments must be made as the result of an established, well known and understood advisory process to facilitate selection of the best candidate.

2. Nominations or suggestions for candidates should be encouraged from a wide variety of sources - judges, lawyers, politicians at all levels and the public generally.

3. The Canadian Bar Association National Committee on the Judiciary has improved the process, but by its nature it cannot ensure that only the best candidates are considered for appointment.

4. In a federal system where judges adjudicate on both federal and provincial civil and criminal law, it is essential for meaningful consultation to take place between the federal appointing authority and provincial attorneys-general. This consultation has been inadequate or completely lacking in the past.

5. Consultation in advance of appointments should also take place with the chief justice of the relevant court. Here again, consultation has often been inadequate or completely lacking in the past.

6. The necessary consultations with attorneys-general should involve the federal minister of justice at some stage or, in cases that concern the prime minister's prerogative, the prime minister. These consultations are too important to be delegated completely to staff.

7. To avoid delays in filling vacancies on the bench, the selection process should be initiated well in advance of anticipated vacancies.

8. Appointments to the Supreme Court of Canada must continue to be representative of the regions and legal

systems of Canada. The minister of justice should consult the chief justice of Canada and the attorney-general (or minister of justice) of the province from which the appointment is to come, or the attorneys-general of the provinces in the region from which the appointment is to come. In addition, the minister of justice should obtain and take into consideration the views of all other provincial attorneys-general and ministers of justice.

9. Because the Federal Court of Canada is the only court for suits against the federal Crown, it is important that the selection process remove all perception of bias in favour of the federal government. At present, this court is perceived by many, rightly or wrongly, as a government-oriented court because so many former politicians and federal officials have been appointed to it.

10. Parliament should not play a role in the selection or appointment of federal judges. It is neither necessary nor desirable for the legislative branch to be involved. It is contrary to the Canadian tradition for the appointment of judges to be subjected to a congressional-type process of public examination and review.

Advisory Committees on Federal Judicial Appointments

11. We ... recommend that there be an Advisory Committee on Federal Judicial Appointments in each province and territory to advise the minister of justice on appointments to section 96 courts and to the Supreme Court of Canada.

12. Each provincial or territorial committee should be composed of the following members:

    i) the chief justice of the province or territory, or his or her delegate, who would chair the committee;

    ii) one person appointed by the federal minister of justice;

    iii) one person appointed by the attorney-general or minister of justice of the province or territory;

    iv) two lawyers, one appointed by the governing body of the legal profession and one by the branch of the Canadian Bar Association in the province or territory concerned; and

v) two lay people representative of the public to be appointed by majority vote of the other members of the committee, Government and Crown corporation employees, and Members of Parliament, the Senate or the provincial legislature would not be eligible for appointment as lay representatives.

Save for the chief justice or delegate, members should serve for a maximum term of five years, and terms should be staggered to ensure continuity. Travel, secretarial and out of pocket expenses of committee members should be the responsibility of the federal government.

13. A committee would be consulted by the federal minister of justice on all vacancies occurring in its province and would submit to the minister the names of no fewer than three people qualified to fill each position. Committees would consider names suggested by the minister and by other sources, and should also seek out names of candidates themselves.

14. While committees are understood to be advisory, the minister of justice would be expected to make each appointment from the list supplied or, failing agreement, to ask the committee to bring forward further recommendations.

15. Committees would establish their own procedures for determining the qualifications of candidates, including consultation with the chief justice or chief judge of the court concerned. All such investigations should be conducted in confidence.

16. The appropriate advisory committee should also be consulted by the minister of justice with respect to elevations from one court to another. Proposed elevations should not be treated differently from other appointments.

17. The prime minister should consult the appropriate committee with respect to the appointment of chief justices, associate chief justice and chief judges from among those already serving on the bench. Appointments to these positions direct from the bar should be treated in the same manner as other new appointments.

18. In the case of appointments to the Supreme Court of Canada, the relevant advisory committee(s) would be the one for the province, or those of the provinces in the region, from which the appointment is to be made. For these appointments only, advisory committees could submit fewer than three names, or no name at all, if they deemed appropriate.

    In the case of the Federal Court of Canada, the Tax Court, and any other federal courts that might be created, a separate advisory committee is required.

19. We ... recommend that there be an Advisory Committee on Appointments to Federal Courts composed of the following members:

    i) the chief justice of the Federal Court of Canada, or his or her delegate, who would chair the committee;

    ii) one person appointed by the federal minister of justice;

    iii) two lawyers, one appointed by the Canadian Bar Association and one by the Federation of Law Societies of Canada; and

    iv) three other people, at least two of whom are lay people representative of the public, appointed by majority vote of the other members of the committee and taking into account the need for regional representation.

    When the committee is considering appointments to the Tax Court, the chief judge of the Tax Court should also sit with the committee.

    The membership criteria, term of office and advisory procedures that apply to provincial and territorial advisory committees (as described in recommendations 12 to 17 above) would also apply to this committee.

20. If the mechanisms and procedures we recommend are adopted, there will no longer be a need for the Canadian Bar Association National Committee on the Judiciary.

Provincial and Territorial Appointments

21. All provinces ... should adopt procedures, modify existing procedures, or adopt or amend legislation so that provincial appointing authorities are provided

with an effective source of independent advice on judicial appointments. This will require the following steps:

i) the procedures of the judicial councils of Ontario and Saskatchewan should be changed, by statute if necessary, so that they can propose names to the attorney-general;

ii) Manitoba and Nova Scotia should change the mandates of their judicial councils so that they have responsibility for recommending provincial judicial appointments;

iii) Nova Scotia should alter the membership of its council so that the public is represented by lay members; and

iv) New Brunswick and Prince Edward Island should establish judicial councils with appropriate mandates to recommend provincial judicial appointments.

This recommendation seeks to raise judicial selection procedures in all provinces to the standards established by British Columbia and Quebec.

22. Provincial and territorial appointments should be made only after consultation with the chief judge of the provincial or territorial court concerned.

23. In provinces and territories where justices of the peace carry out adjudicative functions, the procedure for selecting and appointing them should be the same as that for provincial court judges.

Criteria for Appointment

24. After discussing the basic qualifications and character requirements for judicial appointment with a large number of knowledgeable people that are, or have been, involved in appointing judges in Canada, the committee recommends the following list of essential qualities for men and women being considered for judicial appointment:
High moral character
Human qualities: sympathy, generosity, charity, patience
Experience in the law
Intellectual and judgmental ability
Good health and good work habits
Bilingualism, if required by the nature of the post

25. In the present climate of public opinion about judicial appointments, and because of the appearance of political influence, it is inappropriate for cabinet ministers to be appointed directly to the bench. However, it would be unfair to exclude ex-ministers from consideration indefinitely. The committee therefore recommends that no such candidate be considered for appointment for at least two years after resigning from cabinet.

Training

26. We ... recommend that the government of Canada support the establishment of a national centre for judicial training and education for both federal and provincial judges. This would mean that courses for newly appointed judges would be available at all times, not only once a year as at present. We also invite the federal and provincial governments, the Canadian Judicial Council, the Canadian Bar Association and other interested groups to explore means to give practising lawyers an opportunity to serve in part-time judicial capacities in order to test or improve their qualifications for appointment to the bench.

Conditions of Employment

27. Both federal and provincial governments should look for ways to overcome two factors that inhibit well-qualified people from accepting judicial appointments. The Income Tax Act should be amended to eliminate double taxation during a judge's first year on the bench. Salaries and other benefits of judges in all courts, whether appointed federally or provincially, should be maintained at appropriate levels. Inflation protection for provincially appointed judges' salaries should be established by statute, as it is for federally appointed judges.

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Appendix 8

RTNDA MODEL GUIDELINES GOVERNING ELECTRONIC PUBLIC ACCESS TO PROCEEDINGS

1. Equipment and personnel

(a) Unless the court permits otherwise, not more than one portable television camera (film camera - 16 mm sound on film (self blimped) or video tape electronic camera), operated by not more than one camera person, shall be permitted in any trial court proceeding and not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Unless the court permits otherwise, not more than one still photographer utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobstrusive and shall be located in places designated in advance of any proceeding by the Chief Justices or Chief Judges of their respective courts or their designates.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the court to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the court shall exclude all contesting media personnel from a proceeding.

2. Sound and light criteria

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such photographic and audio equipment shall produce no greater sound or light than the equipment designated in Schedule A (not attached), when the same is in good working order. No artificial lighting device of any kind shall be employed in connection with the television camera and no camera shall give any indication of whether it is or is not operating, such as by use of a red light to note operational status.

(b) Only still camera equipment which does not produce distracting sound shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound than a 35 mm Leica "M" Series Rangefinder camera and no artificial lighting device of any kind shall be employed in connection with a still camera. No motorized drives shall be permitted.

(c) It shall be the affirmative duty of media personnel to demonstrate to the court adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

3. Location of equipment personnel

(a) Television camera equipment shall be positioned in such location in the court facility as shall be designated by the Chief Justices or Chief Judges of their respective courts or their designates. The area designated shall provide reasonable access to coverage. If and when areas remote from the court facility which permit reasonable access to coverage are provided all television camera and audio equipment shall be positioned only in such area. Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(b) A still camera photographer shall position himself or herself in such location in the court facility as shall be designated by the Chief Justices or Chief Judges of their respective courts or their designates. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or herself through further movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(c) Broadcast media representatives shall not move about the court facility while proceedings are in session, and microphones or taping equipment once positioned as required by 1(c) above shall not be moved during the pendency of the proceeding.

4. Behaviour and Dress

Media representatives will be expected to present a neat appearance in keeping with the dignity of the proceedings and will be expected to be sufficiently familiar with court proceedings to conduct themselves so as not to interfere with the dignity of the proceedings, or to distract counsel or the court.

5. Movement during proceedings

News media photographic or audio equipment shall not be placed in or removed from the court facility except prior to commencement or after adjournment of proceedings each day, or during a recess. Neither television film magazines nor still camera film or lenses shall be changed within a court facility except during a recess in the proceeding.

6. Courtroom light sources

With the concurrence of the Chief Justices or Chief Judges of their respective courts or their designates modifications and additions may be made in light sources existing in the facility, providing such modification or additions are installed and maintained without public expense.

7. Conferences of counsel

To protect the lawyer-client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between counsel and their clients, between co-counsel of a client, or between counsel and the court held at the bench.

8. Impermissible use of media material

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

Schedule A to this Appendix lists the specific types of equipment to be used in a courtroom. This schedule has not been reproduced.

Briefs and Submissions

Although some of the material received has been made public, the Inquiry takes the the position that all of the briefs and submissions are confidential. Anyone who who is interested in receiving copies of the briefs and submissions should address themselves directly to the people who made the submissions.

Advocacy Resource Centre for the Handicapped
Advocates' Society
Mr. L. Alex
Mr. R.R. Anger
Associated Credit Bureau of Ontario
Association des Juristes d'Expression Française de l'Ontario
Association of Professional Engineers of Ontario
Barrier Free Design Centre
Baron Data
Behavioural Health Inc.
Mr. R. Bell
Bernadette McCann House for Women
Mr. S. Biss
Mr. R. Broughton
Mr. L. Brown
Mr. J. Burgar
Mr. R. Burton
Mr. M. Bury
Canadian Bar Association - Ontario
Canadian Daily Newspaper Publishers' Association
Canadian Organization of Small Business Inc.
Canadian Society for the Advancement of Legal Technology
Mr. H. Cartwright
Mr. J. Cerniuk
The Chartered Shorthand Reporters' Association
Children's Aid Society of Metropolitan Toronto
Mr. R. Church
Mr. R. de Clerville
Mr. P. Copeland
Mr. D. Cole

Collectrite (Cornwall) Inc.

Mr. J. Colvin

Community Justice Initiatives of Waterloo Region

Community Legal Services of Niagara South

Consumer Association of Canada (Ontario)

County of Carleton Law Association

The County and District Law Presidents' Association

County of York Law Association

Court of Appeal of the Supreme Court of Ontario

Court Reporters' Association of Ontario

Criminal Lawyers' Association

Mr. N. Crowder

District Court Judges
  Judge N.D. Coo
  Judge G. Ferguson
  Judge E. Houston
  Judge S.R. Kurisko
  Judge G. Killeen
  Chief Judge W.D. Lyon
  Judge E.I MacDonald
  Judge J.R. Matheson
  Judge R. Meehan
  Judge R. Stortini
  Judge K.M. Weiler
  Judge J. Wright

District Court Judges' Association

District of Parry Sound Family Resource Centre

Mr. T. Dunne

Mr. P. Dunnion

Durham Region Law Association

Ms. S.E. Elliott

Essex Law Association

Etobicoke Family Court Committee

Family Law Commissioners

Family Law Lawyers' Association of the County of Essex

Family Mediation Canada

Family Mediation Service of Ontario

Mr. A. Fisher

Mr. B.G. Freesman

Frontenac Law Association

Gay Court Watch
Mr. J.M. Gautreau
Mr. B.T. Granger
Professor Ian Greene
Hamilton Law Association
Hastings Law Association
Haven House
Ms. W. Hearder-Moan
High Court of Justice of the Supreme Court of Ontario
Mr. A. Hill
Hope Haven Homes
John Howard Society of Metropolitan Toronto
Huron Law Association
Prof. A. Hutchinson
Mr. P.M. Iacono
Interim Place
Mr. D. Jury
Justices of the Peace Association of Metropolitan Toronto
Kenora District Law Association
Kingston Interval House
Kingston Township Voters' Association
Mr. E.R. Kruzick
Mr. R. Lambert
Lambton Law Association
County of Lanark Law Association
Mr. D.J. Lees
Legal Assistance Kent
Ian Leith & Associates
Mr. A.D. Levy
Lincoln Collection Agencies Ltd.
Lindsay Law Association
London Family Court Clinic Inc.
Mr. G.C. Magwood
Markham Board of Trade

Masters of the Supreme Court of Ontario
    Mr. S.D. Cork
    Mr. R.B. Linton
    Mr. D.H. Sandler

Gay Court Watch
Mr. J.M. Gautreau
Mr. B.T. Granger
Professor Ian Greene
Hamilton Law Association
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Masters of the Supreme Court of Ontario
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  - Mr. R.B. Linton
  - Mr. D.H. Sandler
  - Mr. E.R. Browne

Mr. B. McKessock
Mr. J.A. McLeish
Mr. J.S. McNeil
Mr. G. K. McNeilly
Mr. C.J. Meinhardt
Metropolitan Toronto Coordinating Committee Against Wife Assault
Metropolitan Toronto Police Force
Mr. F.J. Montello
Municipal Police Authorities
Mr. E.R. Murray
Muskoka Interval House
Mr. C.B. Noble
Mr. R. Oatley
Mr. R.A. O'Donnell
Official Guardian
Ontario Advisory Council on the Physically Handicapped
Ontario Association of Chiefs of Police
Ontario Association for Family Mediation
Ontario Association of Professional Social Workers
Ontario Association of Sheriffs and Court Registrars
Ontario Chamber of Commerce
Ontario Court Administrators Association
Ontario Crown Attorneys Association
Ontario Family Court Judges' Association
Ontario Federation of Labour
Ontario Medical Asociation
Ontario Provincial Court (Civil Division) Judges' Association
Ontario Public Service Employees Union
Ontario Small Claims Court Association
Optimism Place
Ms. Christine O'Rourke
Mr. J.W. Outerbridge
Parkdale Community Legal Services Inc.

Peel Criminal Lawyers' Association

Mr. N. Peel

Persons United for Self Help in Ontario

Philips Planning and Engineering Ltd.

Mr. D.W. Phillips

Mr. A.L. Philpot

Police Association of Ontario

Police Commissioners
    Town of Espanola
    Town of Fort Frances
    Town of Kenora
    Town of Kirkland Lake
    Township of Michipicoten
    Town of New Liskeard
    Town of Nickel Centre
    Town of Rayside-Balfour
    Township of Red Rock
    Township of Terrace Bay
    City of Thunder Bay
    City of Timmins
    Waterloo Region

Mr. R.B. Potter

Dean R.S. Prichard

Provincial Court (Criminal Division)
    Judge R.D. Clarke
    Judge J.L. Clendenning
    Chief Judge F.C. Hayes
    Judge K.A. Langdon
    Judge H. Momotiuk
    Judge R.D. Reilly
    Judge R.T. Weseloh

Provincial Court (Family Division)
    Judge J.F. Bennett
    Judge F.S. Fisher
    Judge N. Weisman

Provincial Court (Civil Division)
    Judge G.C. Chown
    Chief Judge S.D. Turner

Radio Television News Directors Association of Canada

Rehabilitation Institute of Ottawa

Mr. A.J. Risen

Mr. Clayton Ruby

The Salvation Army

Mr. D. Scott

Mr. W.A. Scott

Mrs. B. Shaika

Mr. B.B. Shapiro

Simcoe Law Association

Sioux Lookout Community Legal Clinic

Mr. N.S. Slover

Mr. R.T. Smith and Mr. J.A. Benn

Dr. B.M. Stewart

M. D. Stockwood

Sudbury District Law Association

Supreme Court of Ontario
- Mr. Justice Austin
- Mr. Justice Blair
- Mr. Justice Bowlby
- Mr. Justice Galligan
- Mr. Justice Haines
- Mr. Justice R.E. Holland
- Mr. Justice O'Leary
- Mr. Justice Osborne
- Mr. Justice Smith
- Mr. Justice Walsh

Mr. G.J. Thernesz

Mr. C.R. Thomson

Thunder Bay Law Association

Mrs. E. Tyrrell

Union of Ontario Indians

Unified Family Court
- Judge T.A. Beckett
- Judge J.A. Goodearle
- Judge D. Mendes da Costa
- Judge D.M. Steinberg
- Judge J.E. Van Duzer

Mr. H.R. Weilenmann

Mr. J.A. Wilcox

Mr. K.R. Withers

Prof. J.S. Ziegel

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Rules of the Provincial Court (Civil Division), O.Reg. 797/84, as amended

Rules of the Provincial Court (Family Division), R.R.O. 1980, Reg. 810, as amended

Rules of the Unified Family Court, R.R.O. 1980, Reg. 939, as amended